WITH THE PUBLISHERS' COMPLIMENTS

THE DATA OF JURISPRUDENCE

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THE DATA

OF

JURISPRUDENCE

BY

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"Est itaque quod gratias agamus Macciavello et hujusmodi scriptoribus, qui aperte et indissimulanter proferunt quid homines facere soleant, non quid debeant." *Bacon.*

"Mais qu'est-ce donc enfin qu'une loi? Tant qu'on se contentera de n'attacher à ce mot que des idées métaphysiques on continuera de raisonner sans s' entendre." *Rousseau.*

"I suggest that we should abandon for the present the enterprise of deciding what the State ought to be, and to aim at and consider by way of pure observation what it has actually been." *Sir John Seeley.*

"While we are apparently aiming at definitions of terms, our attention should be really fixed on distinctions and relations of fact."

H. Sidgwick.

"The first call of a theory of Law is that it should fit the facts."

Mr. Justice Holmes.

Rec. Feb. 6, 1904

PREFACE.

THIS volume is the first instalment of a treatise on Jurisprudence, but is so far complete in itself. I have given it the title of "The Data of Jurisprudence," because I am more anxious to state the problem, "What is Right?" "What is Law?" than at present to offer any solution. I have generally adopted the standpoint of the common sense man, but the difficulty in the earlier chapters is to stop at the point where law becomes technical. I have not, however, hesitated to use technical illustrations where the law is simple and elementary, because every law, like the language in which it is expressed, is an adaptation of popular ideas to technical purposes. I have made my illustrations as numerous and as wide as possible, in order that the bases of induction may be as wide as possible. In like manner, in the mode of arrangement and in the discussion of the aim of law in the last chapter, it has been necessary to anticipate much which belongs to more abstract philosophy, but I hope to have an opportunity of discussing the subject there dealt with more fully and more deliberately hereafter. The main questions on which a provisional position is assumed are the following:—

1. In the matter of method, I wish to protest against the pretensions of the professional "philosopher," who declares

that "Law is just applied Philosophy," as if "philosophy" were some independent entity. The view taken here is that law gives abundant matter for scientific treatment by induction, and has a metaphysic of its own as much as religion (Theology) or the phenomenal universe (Physical Science).

For the purposes of Comparative Jurisprudence it is generally assumed uncritically that the law of each country is a unity. What the unity is, is a question of metaphysics. But within each legal system we may have comparative jurisprudence by collating the civil, criminal, ecclesiastical, military, mercantile, constitutional, and administrative systems. Or again, within one such system we may make a comparative jurisprudence, for example, by comparing contracts, sale, loan, pledge, trusts, marriage, and so on; or by comparing the laws dealing with murder, theft, robbery, fraud, and other crimes. So strongly did this view appeal to Sir J. F. Stephen, that this eminent jurist, in his *History of the Criminal Law*, denied that the criminal law of England was a unity. But, as I have just pointed out, the nature of the unity is a metaphysical question.

2. It is assumed that the phenomenon known as Law (Right) presents itself in three aspects—Right, Duty and Law—in a narrower sense. Each of these implies the others, and an exposition of any one involves a full exposition of the other two. From what source these ideas flow is a question of history. Whether these elements are really different aspects of one reality, and whether we ought to find one or more additional elements of the same kind, are questions of metaphysics.

Under each of these heads I have discussed the various forms assumed, according to the matter or interest involved, and have given these in tabular form.

3. In each section, dealing generally with a single idea, I have provisionally traced a (scientific) law of (jural) law,[1] that physical ideas tend to become ideal, and ideal tend to become physical, many words assuming all these forms in the course of their history. This of course is connected with the general theory of the relation of thought and language.

4. Another (scientific) law which may be traced is the tendency of law to develop from extrajudicial to technical judicial forms, and again to become extrajudicial,—first, rude rough remedies — then technical judicial procedure—then extrajudicial substantive law, shading off into morality and religion. This presents several interesting topics of discussion :—First comes the relation of law to logic—form and matter. The view which I have maintained at considerable length is that it is as great a mistake to define Jurisprudence as a formal science, as it would be to confine the idea of literature to spelling, grammar, or even rhetoric, except in the Aristotelian sense. Formal logic I assume to be a development of grammar. Then we may notice the relation of law to economics. The ideas of interest, value, credit belong to both sciences, because they deal with different aspects of persons, things, and property. Again we may notice the relation of law to ethics—individual cases to courses of conduct. The history of ethics points to this science being a development of politics and technical positive law. And

[1] Bacon, "Laws of Laws," *De Augmentis*, viii. (Spedding, v. 89)

lastly, we may mention the relation of law to politics. If this is taken as the science of the state, one of the ends of the state is the establishment of courts of law, and of substantive law for the maintenance of order: but law ultimately becomes supreme, reacts on politics, and gives states and state systems a legal character. *Order* in the state becomes idealised in *Justice*, and this tends to become in the law abiding, orderly, and just individual *Righteousness*, in a sense which ultimately tends to become religious or theological.

5. The question whether the ultimate reality of law is material and physical, as in the theory which makes a physical sanction an essential element of a law: or whether it is an idea of Justice: or a combination of both, is the ultimate question of legal metaphysics. To this subject also belong questions as to the reality of person, thing, corporations, the state, contract, obligation, &c. For the present we assume that they all belong to the world of reality, for if the starving beggar disputes the right of property, or the ruined merchant questions the sacredness of contract, we have no difficulty in making the law very real to him.

Closely connected with these topics is the question, what is the unit of law? Is it a statute, as maintained by the "command" theory? or a case, as suggested in the following pages? or a vague feeling embodied in a general maxim? And since we analyse cases for purposes of practical solution, what do we mean by a "point" of law? Is a point of law the reality of law—a legal monad?

The illustrations have been drawn mainly from the Roman law and from Scots law, as the doctrines here ex-

pounded formed the basis of a course of lectures delivered by me in the University of Glasgow. For the same reason I have generally retained the Scottish and Continental mode of referring to the *Corpus Juris Civilis*. The innovation of omitting the name of the title quoted appears as strange as the American one of omitting the names of cases, and referring only to the volume and page of the Reports. Both practices may be defended on the same grounds.

Among the friends who have assisted me in passing this volume through the press, I must particularly mention Mr. CLAUD P. BOSWELL, Advocate, with whom for many years I have discussed the main points of the theories here set forth. Although his philosophical position differs from my own, he has kindly read all the proofs and favoured me with much minute and trenchant criticism, which has at all events enabled me to make my argument more convincing to myself.

I am also indebted to my old friend and fellow student under Professor Lorimer, Mr. R. B. SHEARER, LL.B. (Edin.), of Greenock, who has read all the proofs, and corrected many errors which had escaped my observation.

13 ALBANY STREET, EDINBURGH,
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NOTE.

The following are the editions of the under-mentioned works referred to throughout this volume:—

Ancient Laws and Institutes of England. Edited by B. Thorpe; Folio; London, 1840.

Blackstone's *Commentaries on the Laws of England.* Fifteenth Edition; by Edward Christian; London, 1809.

Bruns, C. G.: *Fontes Juris Romani Antiqui.* Ed. Quinta; Th. Mommsen, 1887.

Huschke, E.: *Jurisprudentiæ Antejustinianæ quæ supersunt.* Ed. Quinta; 1886.

Stephen's *New Commentaries on the Laws of England.* Twelfth Edition; 1895.

Thorpe: see *Ancient Laws*, &c.

INTRODUCTION.

(THERE are three aspects in which Law is regarded, which may be distinguished as (i.) the Political; (ii.) the Juridical; and (iii.) the Philosophical.

(i.) The statesman or politician, as well as the ordinary common sense man, regards law, rights and duties as a whole, without particular attention to details of machinery. To him it is, at least in the first instance, a matter of indifference what the specific rules may be; what he demands is law and order, though as a means to that end systems of technical law become necessary in the developed commonwealth.) British statesmen, with the one end of law and order in view, recognise and administer English, Scots, Manx, Norman, Roman-Dutch, French-Canadian, Hindu, Mohammedan, and other laws, and insert in charters of companies a stipulation that they shall not interfere with the laws and customs of African or Polynesian tribes. Provided the people keep the peace, the law which they observe is of as little or as much importance to the government as their language or their religion. A wise government will sometimes try to change them, a prudent one will generally take them as it finds them, unless they are inconsistent with the primary ends of the State. In like manner the ordinary man of business cares little for a "beautiful" case. He wishes it settled somehow on the most favourable terms he can obtain. But even here the pocket is not all. Men have ideals.

((ii.) The lawyer, legal practitioner, or judge takes a different view. He also regards rules as just or unjust, but his

justice and injustice do not necessarily coincide with those of the statesman and the common sense man. To enable him to administer law, he is forced to name and catalogue jural relations.) His enforced attention to cases makes him see them in classes and groups, and reveals details of analysis which neither the public as a whole, nor even the individuals immediately concerned, regard as of the slightest importance. (The politician and the lawyer may each regard his own view as concrete, and the other's view as abstract. The two views are real, and are necessary for the State, but the one may grow so as to overshadow and destroy the other; when they are in conflict, legislation may solve the difficulty.)

((iii.) The third view regards law and laws as sociological phenomena. It accepts the views of the politician and the lawyer as historical or actual facts. It discusses their relation, and asks such questions as, whether the two views may be identified, and what is the reality behind both? It discusses the multiplicity of legal institutions and categories, endeavours to resolve them into their simplest elements, and to show the ultimate foundation on which they rest. This aspect comprehends the History of Law, and the Metaphysic of Law.)

(The title of Jurisprudence may be taken as generic, covering the whole subject. The present volume deals chiefly with the first of the above aspects, and its aim is to treat the phenomena of Rights and Laws inductively as in ordinary physical science. The objects of study are found in judicial decisions, legislative enactments, and theoretical treatises, and also in ordinary literature and traditional customs. The attempt is made to group the ideas together, and to show the connection —historical, logical, psychological, or other—between them.) The distinction sometimes drawn between the natural and the moral sciences, that the latter have as their special and primary object to determine what ought to be, and not to ascertain what merely is, must be rejected as untenable and

useless. The distinction arises chiefly from the standpoint which the investigator happens to adopt, and the purpose he has in view. Our primary object in Jurisprudence, as in Geology, may be to enumerate, classify, and account for the various shapes which the matter under investigation has assumed. Others may adopt as their primary object the improvement of the law in substance or form, as Bentham and Austin avowedly did, just as some men explore the earth for coal or gold-bearing quartz. But the two objects cannot be separated. We cannot help comparing similar institutions, and pronouncing one better than another as related to some end. We may even become practical, and suggest improvements in substance, nomenclature, or classification, as a scientist playing with electricity may make a discovery with important economic applications. It is no more incumbent on the scientific jurist to be a law reformer or a codifier, or even a practical lawyer, than it is on the scientist to turn his discoveries into inventions and rush to the Patent Office. But pointing out what has been done by legislators, judges, or practitioners necessarily suggests comparison with other or earlier efforts in legislation or judicial decision, and may lead to reconsideration in the future, and ultimate reform of the law either in form or substance. The relation of the jurist to law, and of the moralist to morals, is like that of the grammarian to a language. He gives an account of the language as it *is*, but, assuming the history and the genius of the language, he points out in some details what the development might or should have been. He may try to improve the language as well as to teach it. At all events it is no longer a distinction between the physical and the moral sciences that the former seek to know what "is," and the latter what "ought to be." The modern "moralist" finds it quite a worthy quest to ascertain positive ideas of morality and their relations, and the modern "scientist" is as much devoted to invention as to research and discovery. The former may be sceptical as to the value of

preaching: the latter may despise the acquirement of knowledge "for its own sake," or, contrariwise, he may set himself to learn not only what *is* known, but also what *ought to be* known. The distinction was drawn in the days when "moral" philosophy was at the hortatory stage, and "science" meant a body of definitely ascertained facts. Moral philosophy was then an art and not a science. The great discoveries of the nineteenth century have raised a spirit of research, as the discoveries of gold in Australia and America created a fever of gold-mining. This scientific spirit—archæological and sociological—has now attacked the sphere of ethics and psychology.

CHAPTER I.

THE PHYSICAL BASIS OF RIGHT.

SECT. I.—MAN AND SOCIETY: THE LAW OF NATURE.

MAN lives in a world of men: he is a social animal. He lives in a world of things and of lower animals.

These two physical facts are the physical foundation on which have been erected the ideas of right and of law as regulating rights. In one sense in which those magic words have been used, they are the laws of Nature from which all positive rights and positive laws are ultimately derived.[1]

Man is a social animal. The individual not only lives in a world of men, but he is only an atom of humanity, essentially related as effect and cause to other men. This is true of the physical fact (law of Nature) of sex, which Ulpian, as Aristotle had done long before, put in the forefront of his system when he said—"Jus Naturale est quod natura omnia animalia docuit. . . . . Hinc descendit maris atque feminæ conjunctio, quam nos matrimonium appellamus."

[1] The word "physical" (unless the context requires otherwise) is in the sequel frequently used as opposed to "jural" or "legal." It refers to the abstract facts apart from the jural interpretation put on them by litigants, judges, or legislators. It is an extension of the idea which is found in Scottish legal practice in the association of—

1. Grounds of action,	as opposed to		Conclusions of a Summons;
2. Condescendence (Statement) of Facts,	,,	,,	Pleas in Law;
3. Evidence (facts),	,,	,,	Law;
4. Jury,	,,	,,	Judge;
5. Findings in Fact in a Judgment,	,,	,,	Findings in Law.

In this view, morality, religion, superstition, and all mental states, if they display themselves in overt acts, are physical facts. They certainly give rise to ideas and claims of right and to laws which either approve, regulate, or condemn the rights so claimed.

Whatever Ulpian meant by *Jus Naturale*, it is a physical fact that without this association the race would become extinct in a very few years. It is not relevant to our present purpose to trace the history of human marriage; it is enough to note that the relations of the sexes are not momentary or transitory, like those of some insects; nor for a season, like those of some beasts and birds; nor merely physical, as with fishes; it may commence in child friendship, like that of Enoch Arden, Philip and Annie; it may last after one of the parties is long dead; during its subsistence the merely sexual element is entirely subordinate to ethical ends. To the modern legislator these are *facts*, or postulates, and they are not less so though it should be shown that historically law in the jural sense has to some extent given rise to those ideas, or even entirely created them, and so to some extent modified man's nature.

The relation of parent and child, as Ulpian further observed, is another illustration of this social relation. All mammals suckle their young, and many tend them till they are able to tend and protect themselves; but in the case of no animal does this relation extend over so long a period and involve so much devotion as in that of the human animal.

And finally, men unite their forces for various purposes, —to lift or roll a stone too big for one, to defend themselves from aggression or to make aggression successful,—until we come to the most modern development of the division of labour. These associations are economic, or perhaps political, but there are also associations for amusement, for instruction, or for religious ceremonies. In short, the solitary man is almost as helpless as the child. The life of the savage may be simple, for it is nearer the life of the mere animal than the life of a civilised man. A hermit, separating himself from civilised society, owes to civilisation the very rope round his waist, and his safety may be due to the extermination of wild beasts by his ancestors. Even he owes the possibility of existence to society.

Gregarious animals show sympathy in some cases with each other. But in man this feeling has its highest manifestation. The seeing of pain causes pain. We mark sympathy in social movements like strikes of workmen, in family feuds like the vendetta, in fights of school-boys, in *esprit de corps* of bodies of men, even in panics and fashions. In its lowest form this may be only nervous sympathy, like the pain which some injury to the living body causes to other parts.

But man is conscious in a sense which does not apply to the lower animals. Memory and imagination carry him further back and further forward than do the faculties of the lower animals. It is this consciousness, combined with the physical formation of his hands, that makes him what we may call an inventive animal.

Whether the mind of the lower animals differs from that of man in degree or in kind is not relevant to our present purpose. What we are concerned with is that, in many important particulars, man has intellectual endowments beyond horses, dogs, or monkeys. He is an articulate-speaking animal. Dogs bark to express anger, joy, or their simple wishes,—for example, to get a door opened; but if they were intellectually on a level with man, they would invent a vocabulary of barks, and would make some attempt to teach this to men. So far is man now in advance of the animal, that his very interjections have become articulate—pious ejaculations, cheers of applause, oaths and curses. Again, men are fire-using animals. All animals enjoy a fire; man only can make one and keep it alive. Language and fire are the two great fundamental discoveries or inventions of man—so great that they have been regarded as special revelations from heaven; but language is a social invention, and is evidence of his social character.

But further, man is conscious of himself and of ends which he may attain, in some sense in which the lower animals are not. He can bring his whole body into subjec-

tion for lower or higher ends, and make it an instrument to serve his purposes. His very vices, culminating in the act of self-destruction (so common in civilised communities), are impossible to other animals. Man's inventive powers have made him a cooking animal, a brewing and distilling animal. The wasp enjoys getting drunk on natural alcohol; man only can look forward to the pleasure, or the still more remote pain.

Man projects himself into inanimate nature and seeks for sympathy in it and in the lower animals; and still more does he look for sympathy in his fellow-men and finds it. If in them he find a ready response to every change in his own mood, the individual and the social aspects of man coincide. The brave man may make his whole tribe do deeds of daring; one coward may create a panic. The orator, the singer, the poet, all appeal to other men, and use them for the immediate purposes of their art. When one man finds that he can play upon another man like an instrument his inventive powers again come into play. Men utilise each other as leaders and generals, or as slaves or assistants. A great painter like Rubens may communicate his ideas to pupils, and his pictures may only receive a finishing touch from himself. An editor may so impress his assistants or contributors that he may multiply his own capacity a hundredfold. Thus we have founders of schools of painting, of architecture, of poetry, of philosophy. When workmen are dissatisfied with the share of the product taken by their employers in name of profit, they begin a crusade by paying out of their wages another body of men to organise and lead the struggle with the employers. In trying to make the old employers their servants, they may make the new servants their masters. It is on such *physical* facts that the whole art of education, moral, intellectual, and technical, is founded. For education is the inventive faculty brought to bear on human nature, active and passive. And when we become conscious of our educative powers, education itself becomes a science. The

lower animals teach their young, or each other, but their tuition hardly rises to the dignity of an art.

Being an animal, and at the same time a self-conscious one, man both determines and is determined by his surroundings. In the tropics he goes naked and eats fruit; in Greenland he wears sealskins and eats blubber. The reason for both sets of actions is ultimately the same. But the most important surroundings of men may be other men in tribes or powerful states. These will determine whether men live nomadic lives of traders, hunters, or shepherds, or gather themselves together upon fortified hill-tops or in embattled camps. Even within each group one man must conciliate another, and compromise is the most elementary foundation of society. We may illustrate this from the commonwealth of the bees. It used to be a favourite subject with some persons to enlarge on the wonderful instinct shown by the bee in making its comb in the form of a hexagon, since this figure is one that economises space in the most perfect degree.[1] But instinct has no more to do with the matter than reason. It is the mathematical observer who puts reason into the process, or the philospher who denies reason to the bee, but attributes its action to the implanted reason called instinct. The true reason is physical and mathematical. It is possible to describe round a circle six circles each equal to the first, and touching it and also the two adjacent circles. The reader may satisfy himself experimentally as to the fact, with the aid of seven coins, discs, or balls. Now, as all the bees are approximately equal, and each tries to make a cylinder with its body and wings, it is hemmed in by *six* (and no more) neighbours of equal size, all attempting the same thing, and the resulting compromise is a hexagon, with the mutual tangents of the circles extended for the sides of the figure. In like manner, if the cells of bees working in opposite directions meet so that the partitions of one set form the ends

[1] Reid's Works (Hamilton's ed.) ii. 546. *Cf.* Maeterlinck, *The Life of the Bee*, p. 158. Lloyd-Morgan, *Animal Behaviour*, p. 207.

of the other, then each bee meets *three* working in an opposite direction, and the end of each cell is a solid angle bounded by three planes. The end of each cylinder is a section of a sphere. It rests on three equal spheres, and no more. If the bees are absolutely equal in size and power, the figures are symmetrical, and solve a nice problem in *maxima and minima*, as Maclaurin proved to the Royal Society. Why the cells meet thus is not so easily explained, but Reid's instinct cannot satisfy the scientist who has followed thus far. Probably the whole mystery is that the angle is the point of least resistance. Is it not the case that columns of basalt crystallise in the form of hexagons? The honeycomb is to us rational; to the bee it is physical; and instinct in the sense of an inferior reason has no more to do with the matter than it has to do with the providing of a supply of honey food for men, bears, or wasps.

Now the same fundamental physical principles apply to human relations. Why is Europe parcelled out among men of different speech and different race? The barrier is the physical resistance of neighbouring nations. Why did one State not annex Africa? Because it would have had to fight other States that required or desired a share and were prepared to fight for it. And within each community the same applies. A trader making a fortune brings into competition other traders, who share his profits. Religious toleration arose when men came to see the possibility and the folly of revenge. Freedom of person and enjoyment of property may all be put on this physical basis; and it may be indeed a question if men would ever have learned the golden rule, "Whatsoever ye would that men should do unto you, do ye even so unto them," if it had not been branded on their quick-flesh by physical suffering. Men's prejudices are generally determined by their interests. The lust of power has made individuals generals, statesmen, kings, who have welded other men into States. These "animal" passions and "animal" impulses are common to man with all other

animals. As the most gorgeous palace must have its foundation laid deep in the earth, so man's animal body and its passions and impulses are the necessary condition of his legal and moral life. But his mental equipment beyond that of other animals, his fears, his ambitions, his very whims, must be considered and provided for by the ruler and legislator.

Man is an imaginative animal. So also are other animals, but the sphere within which his imagination works is so much larger, the faculty appears almost to assume the importance of an independent one. Sheep, birds, and other animals are liable to panic; so also are men. But man applies his inventive faculty to the art of tending sheep by taking advantage of their tendency to panic. On the other hand, he has created the art of preventing panic among men by drill and discipline. The bravery of a general, the coolness of a sea-captain, the presence of mind of a theatrical manager, operate by sympathy, and those whom they address, by imagining the absence of danger, avoid its presence.

The statesman and legislator, by appealing to imagination through punishment, either painful or disgraceful, succeed to some extent in retaining an immoral margin within the pale of society. As in a battle all troops generally flee when a certain proportion of their comrades fall, so a determinate percentage of convictions may bring home to the criminal the danger of conviction. If punishment is *fairly* certain, imagination may make it absolutely certain. This is the case with supernatural sanctions, which it is assumed men cannot escape. But now that the fashionable theology has abolished or modified future punishment, the State must provide still more efficient means of detecting and punishing crime than have hitherto existed, or of preventing it altogether.

Man is a laughing animal. He is an artistic animal. He finds congruity or incongruity in external things, or in the relations of men, that excite peculiar feelings of pleasure or pain. The lower animals may be beautiful or ugly; they may make beautiful or ugly things; but man's faculties of

imagination and invention carry him much further on the same road. He sees an interesting event, and he tells the story. In telling the story he embellishes it, and makes the very language ornamental: we have here a beginning of literature and art, poetry and oratory. He can even go further and invent imaginative stories. He finds wonderful things and worships them; he makes wonderful things for worship or use, and, as his skill grows, he proceeds to ornament them, and his art becomes artistic. Houses to hold his deities or to protect himself from the weather suggest ornament, sculpture, and architecture. So every rude practical art gives rise to a corresponding ornamental art. Beauty is admired for its own sake. We have no evidence that the lower animals have similar feelings for beauty. Bees and butterflies are attracted by gaudy flowers; birds assume their finest plumage in the breeding season; but we may assume that the feelings excited are more properly described as physical than as mental. Even in man we can see the physical stage, where savages are attracted by shining beads and polished metals; and our ideas of beauty are so intimately associated with utility, that we are justified in assuming that there is an ultimate physical basis even for the idea of beauty.

But this development does not stop with practical arts and physical beauty. Men have moral and social ends. The citizen may find it to be even sweet and becoming (in an æsthetic sense) to die for his country. He may exhort his brethren to present to their God their own bodies as a living sacrifice, and declare it to be a reasonable service. But these ideas have analogies in so-called lower animal nature, and a physical cause in the nature of man himself. An Indian naturalist has described how the red ant will face certain destruction and so confer a benefit on his fellows.[1] The benefit is indirect, and it does not appear that other ants draw any lesson from observing such devotion. The heredi-

[1] *A Naturalist on the Prowl*, by EHA. (2nd ed.), p. 188; see Lloyd-Morgan, *Animal Behaviour*, chapter v.

tary fear of man and of beasts of prey exhibited by some animals is an intermediate phenomenon. Man exemplifies them all: the rash fool who dies by accident may warn others who are wiser; and the hero who leads a forlorn hope may truly die for his fellows.

If we go to the ant, we may read, as did the ancient sage, many lessons of morality,—co-operation in building their habitations, prudence in the management of their domesticated insects; but the lessons which we read are human; they are for man only, and not for the insects. In many cases each individual beast acts as if the whole universe existed for itself alone. If, as in the case just given, we see conduct beneficial to a group, we resolve it into an individual impulse. Man also is selfish, but with a difference. He may act for himself alone, but he knows his relations to other men, and tries to reconcile the contradiction. We assume that the universe exists for man only: all beasts and birds are put under him. And if we ever put the claims of the individual forward, it is under the guise of society or humanity itself. The most selfish exclaims, "*L'humanité c'est moi.*"

Morality becomes an art of conduct, and men come to ornament their conduct by means of rules of good manners, politeness, and etiquette. Conduct may be good, honest, and upright, but it may also be beautiful. With Plato these ideas were not absolutely distinguished.

And further, in the sphere of the State and the law, the divinity that doth hedge a king, nay, the very institution of royalty, are conscious or unconscious attempts at ornament in statecraft. In royalty, with its palaces, robes, regalia, insignia of office, ministers and ceremonial, the ornamentation may be somewhat unconscious as arising from association with similar persons, the traditions of the office, and the ordinary appetite for luxury, arising from the possession of extraordinary wealth. In republicanism, and the closely related idea of imperialism, the art is conscious. Display is adopted not only to maintain the prestige of the ruler as

against his subjects, but to maintain the dignity of the State in comparison with other States. This is shown on a small scale in the money spent on architectural display in municipal buildings in our own country. Cities vie with each other in this respect. And in law, when once it becomes a separate profession with a determinate sphere of its own, imagination and invention begin to create a higher art. Not only must our laws be equal and just, they must also be short, logical, easily ascertained, symmetrical, elegant. And so a beautiful case—one perfectly lovely as a judicial abstraction—may in its moral aspects be one of hideous deformity. (*Cf.* Roman *elegantia*—epigrammatic neatness; Roby, *Digest*, clxii.)

The physical characteristics of man are assumed by the legislator and the practical lawyer. Prominent among these assumed powers is that of controlling his own actions, which we call will, and which implies individual responsibility. So absolutely necessary is this power to the State and the law, that it would have to be invented if it did not actually exist. If in any quarter of the globe there existed beings who could not control their actions, they would become extinct. Inferior races of men disappear before superior races possessing powers of combination and self-control, just as wild animals and the jungle disappear before the encroachments of civilisation. If any man is not capable of self-control, and cannot be taught to feel responsibility, he either loses his life in collision with the forces of civilisation, or finds a suitable place in a lunatic asylum or a prison.

But while this is a fundamental assumption with regard to the individual man, it is also true that as a body men are subject to invariable laws like physical matter. Suicide is an act of will on the part of each individual, and yet statistics show that a definite annual percentage of the population commit the act; it is induced by external circumstances, disease, famine, calamity, and even the weather.[1]

[1] Judicial Statistics for England, 1899, Part i. p. 38, where a number of works on this subject are referred to.

Each transaction in the market is an act of will, and yet prices rise and fall like the tides. Although the practical statesman and legislator have always assumed the individual will to be free, we seem to see man in history—the same yesterday, to-day, and for ever—hunting and fighting, sowing and reaping, making and trading, marrying and giving in marriage, weeping and praying, laughing and playing, living and dying.

Man has come gradually, by accident and experiment, to learn his own powers as an individual, and the characters and powers of his individual neighbours. By education, social intercourse, and legislation experiments are carried further. By means of these, by imitation, through fear or admiration, differences and eccentricities are worn off, until each man comes to be a specimen or type of the species. If we choose to personify the qualities of men and their traits of character, we may speak of natural selection and the survival of the fittest. In point of fact, it is only men who possessed those traits who have survived at the present day. But if circumstances change, and if men survive at all, the survivors may be other races endowed with virtues and characteristics adapted to their environment.

The foregoing sketch suggests some further observations as to the relation of jurisprudence to other sciences dealing with the human mind. In all these we deal with human action or history from the standpoint of some particular idea or activity. In form it is not uncommon to make an abstraction of the idea or activity, and deal with it historically or systematically, as if it were an independent entity subject to growth and decay. Jurisprudence, when separated from the art of statecraft and government, is itself an independent art. It then becomes a science, and, lastly, has a philosophy. In the first stage law, as a science, may be regarded as positive law; in the last stage it may be regarded as natural law in the modern German sense. In the first it may be merely the science implied in a very

rude art: in the last it may be identified with metaphysics. The idea of right has a history, so have laws themselves, and so has the philosophy that consciously discusses those laws. Thus, although the laws and the philosophy may appear to be discoveries or deliberate inventions of man, when history becomes possible they are in turn regarded as natural phenomena, subject to natural physical laws.

Since jurisprudence is a science of human activities, and touches humanity both on its social and its individual side, it has relations to all human sciences. It appears as a part of human history, and of sociology and economics, and of the science of politics and the State. There it is dealt with as a subordinate phenomenon — subordinate, that is, from the temporary standpoint of the historian or scientist, whose limited faculties do not permit him to comprehend things in their entirety and universality.

On the other hand, the legislator and jurist regard these sciences as subordinate to jurisprudence. They assume as facts, or postulates, the facts of human physiology and psychology—in a popular if not in the purest scientific form —when they deal with crime and punishment, evidence and law procedure. They accept also the tradition of history, as well as the ends established by the popular ethics and religion, when they deal with education. They profess to regard economical principles in legislation as to trade and taxes. Law is so intimately involved with medical science that a new science of Medical Jurisprudence (or Forensic Medicine) has been created. The jural laws of public health are founded on scientific laws discovered by medical men, and the inventions, such as vaccination, founded thereon. The laws of navigation, regulations for street traffic, regulations for building houses, are actually founded on physical facts discovered by man, and now dealt with .by special sciences. They are enacted as jural laws, because in the ultimate analysis the legislator believes human society to be a good and to be

the only means of promoting the interest of the individual men who form the particular society to which the legislator is devoted.

All other sciences contribute to the matter of law, while law necessarily reacts on them, not only in adapting them to its own purposes, but in furnishing another element for their consideration and investigation. Right (in the jural sense) and law are forms assumed by human relations. Jurisprudence is the science which deals with these forms, or with humanity itself from this standpoint, but it is not an empty abstraction like the now generally discarded formal logic of the schools. Attempts to identify them have broken down, for it is impossible to take an intelligible step without referring to the matter of the relations. Just as a grammarian must understand the meanings of words before he can understand nouns and verbs, so the jurist must use human relations to explain even the difference between sale and pledge.

By a metaphysical necessity, by a continuous process of abstraction, we reach a law of nature—an eternal and immutable idea of right, founded upon natural physical laws—natural laws in an earlier sense, but which modern science has also shown to be, so far as our present experience extends, also eternal and immutable—that is, we cannot think them otherwise without contradiction of our very existence. These, then, are the grand fundamental assumptions of men, both legislators and those for whom they legislate, that the world and the scheme of the universe, if not eternal and unchangeable, will at least continue for an indefinite period of time; that the nature of man, however it may be affected in details, is fundamentally and always the same; and finally, that there are in some sense fundamental and natural rights of man, and an eternal and immutable justice.

The further discussion of these propositions must be reserved for the metaphysic of law. Meanwhile we must note that legal phenomena appear only in individual cases. Men who observed these cases grouped, classified, and named

the particular relations. We may therefore find an unconscious analysis of legal rights and of laws by tracing the meanings of the words in which those early classifications were made, and the ideas which suggested such names.

SECT. II.—THE INDIVIDUAL AND CONCRETE RIGHTS.[1]

Having taken a general survey of mankind and society as a whole, we may now turn to the life of a single individual for a single day, and observe how questions of right arise in his relations to his fellows. We may take a civilised man of the present day, such as a merchant carrying on business in a large city and residing in the country, since his relations to his fellowmen are fairly numerous and easily defined. Let us begin from the moment when he rises in the morning. This moment is assumed arbitrarily, for much has been in progress during the night in preparation for the next day. The policeman has been on the outlook for fire or burglars; gas stokers and engineers have been making gas or electricity; lamplighters have been tending the public lamps; scavengers have been sweeping the streets; railways have been carrying post-office sorters who were arranging his letters; newspaper reporters were telegraphing news, which editors were arranging and printers putting into type; bakers rose early to prepare hot rolls; dairymen to milk cows and despatch cream; servants to prepare fires and cook his breakfast. These are merely a few threads of the network which has been in course of weaving all over the universe and from all eternity. We pass over all this and ask no questions as to his title to the light which he uses to dress, the soap and water in his bath, his clothes and personal ornaments. Let us imagine him seated at breakfast.

He is hungry, and wishes a substantial meal. Is the breakfast belated, or badly cooked, or the bill of fare un-

[1] Von Ihering has worked out a similar study in still greater detail in his little book *Die Jurisprudenz des täglichen Lebens.*—(11th ed. by Prof. Lenel).

satisfactory? What is his remedy? For he now desires something else than his breakfast. Is it legal,—the dismissal of one or more servants? or ethical,—a scolding or an internal grumble? This may depend on his position in the house. He may be a young man in his father's or mother's house. He may be a boarder in a stranger's house. He may be proprietor or tenant, with a housekeeper. There may be one or more servants interposed between him and his housekeeper and his breakfast. The rule that the law does not concern itself about trifles does not help us much, for most murders have been committed for mere trifles, and it is easy to magnify a trifle and bring it within the scope of law.

But suppose all his domestic arrangements be perfect, there may be poison in some part of the food, unknown to any one. The tea may have absorbed lead from packing, the oysters in the sauce may have fed on sewage, the sugar may have been in contact with sheep dip in course of transit on the railway, the milk —— If he stopped to consider the possibilities of danger in each mouthful of food, he would sit and starve like Sancho Panza at his banquet. But the dangers are real, and if he suffer, his remedies are legal, civil and criminal, under Public Health Acts, Adulteration Acts, or at common law.[1]

Having breakfasted, he reads a newspaper for a little. If he find no libellous attack on himself, he may find reports and advertisements that concern him—offers of servants or clerks, things for sale, things lost that he has found, shares in new joint stock companies, reports of the failure of companies in which he is interested, and so on, each one being the possible commencement of a long train of negotiation.

The postman calls meanwhile and offers a letter with postage underpaid or unpaid. Is he bound to take it or to pay the postage? If he do so, and the overcharge is correct, can be recover from his correspondent, and how? If the

[1] Cramb *v.* The Caledonian Railway Co., 1892, 19 R. 1054.

overcharge be an error, can he recover from the post-office? If a letter be delayed or lost, has he any claim against the Government?

Our subject then proceeds to the street on his way to business. If his door-step, or the roadway in front of his house, or the slates or a chimney-can, be out of repair, and he be injured as soon as he steps out of his door, his feeling of claim and his remedy will depend on whether he is proprietor or tenant, whether he has complained to the proprietor, whether he has ordered a tradesman to execute the necessary repairs, whether this person has delayed without excuse, and whether the accident is the natural result of the delay. On his way along the street the same possible questions continually present themselves. Openings in the pavement, imperfect flags and paving stones, loose slates and chimney-cans, gutters, telegraph wires and poles, are all possible sources of danger, and the remedy may be against the municipality or a company, or private individuals or creditors in possession of the particular property.—(Digest of Cases in the Court of Session, Scotland, 1885 to 1895, columns 951 and following).

But other dangers beset the pedestrian. Even if the persons he meets be not malicious or mad, or drunk or careless, they may be thoughtless or frolicsome, or jostle him on the street. Can he insist on keeping his right hand to the wall in meeting pedestrians or in passing them? If they wilfully obstruct him, can he force observance of the rule? At crossings must he wait for vehicles, or must vehicles wait for him? If the corporation place a policeman to regulate traffic is he bound to obey the policeman's orders? If the policeman make a mistake, and an accident result, what then? If the corporation appoint no policeman for this duty, and an accident happen at the crossing, is the corporation liable to the person injured?

Let him now leave the street and take a conveyance—say a tramway car. Is he entitled to stop it short of a station?

If so, and the guard refuse, what is the amount of damage, and who is liable? Can he stop other traffic to enable him to enter the car? Is he bound to pay the fare for the whole distance from the previous station? If the car be full inside, and it be raining, is he bound to go on the top, or must he alight? If the guard take his fare, is the company bound to provide a seat inside? If he have got a seat, can he prevent the guard putting other passengers inside to stand? If he rise politely to give his seat to an old lady, is the guard entitled to insist on his going out, or must he turn out the old lady? If it be a wet day, can he prevent passengers with dripping clothes or umbrellas sitting beside him? On the top, can he insist on a passenger taking down an umbrella if it be dripping on him? If he lose his ticket, must he pay again? Must the guard stop the car absolutely to enable him to alight? It is a common experience to see such questions raised in legal form in consequence of a passenger having assaulted the guard or a fellow-passenger, or having been assaulted by one of them. If the question involve a great general principle, it may be discussed seriously in the Supreme Court and the House of Lords. *Edinburgh Street Tramways Co.* v. *Torbain*, 1877, 3 App. Ca. 58, was an action for a fare of one penny.

When he reaches his place of business his relations to his servants are primarily legal. He may be tenant or proprietor of the premises, and the possible questions arising in these relations are similar to those already noticed in regard to his house. He receives letters as he did at home. He meets customers, travellers, or agents from other houses. The relation which begins as one of mere business may end in a closer tie of friendship; or it may result in a dislike which terminates even the business relations. A firm which is always cutting prices and making claims for shortages and breakages will very likely find its account closed and meet with an absolute refusal to deal. So with clerks; one may be slow, careless, or impertinent, but no court of law will

support his dismissal on the spot; it would be too expensive to pay him off with wages in advance, so his engagement is terminated by notice. Again, the employer may grudge his wages; he may either reduce them or give him notice, and hire another clerk or a girl at lower wages; or he may wish to give the position to the son of a friend. The clerk or servant dismissed may think himself ill-used, but he cannot raise an action at law because his master refuses to re-engage him. Again, a clerk has found his situation comfortable and his salary sufficient. He has been ten, fifteen, twenty years in his place; he has regarded himself and has been regarded as a fixture; he has married, and has a family; he could not easily find a new situation, and would have difficulty in fulfilling the duties of one even much inferior; does his master do wrong in reducing his salary or in dispensing with his services? Does the clerk do right in remaining indefinitely drawing a large salary, when a young unmarried man or a girl might do the work as well for half the salary? Our merchant has probably no time for such questions. If he be busy, he just goes on without thinking of them; if he find himself losing money, he is compelled to reduce his staff. His bankruptcy may overwhelm his employees as well as himself and his family.

Having now attended to business, he goes to his club or to a restaurant for luncheon. Let us assume that our subject is in full possession of his privileges at his club, and that his subscription for the year is paid. How many friends may he take in at once to partake of his hospitality without notice? Into what rooms may he take them? If the seats be all occupied, who determines the order in which vacancies are to be filled up? Suppose he leaves and goes to a neighbouring restaurant. If he get a seat without difficulty, and order a chop, but twenty minutes pass without its appearance, can he leave without paying? Can he insist on something else being instantly served up? If, when it comes, it be not cooked to his taste, can he leave it and refuse payment? If

a clumsy neighbour, opening a bottle of soda-water, pour it over his plate containing his chop still untouched, can he demand another supply from the keeper of the restaurant, or must he pay for it and look to the clumsy neighbour for damages? Then all the questions as to poison in the food already referred to arise here again. When he comes to pay how is the amount determined? A contract or a price list might settle it; but if there be neither, who decides? Must he pay whatever is demanded and sue for restitution, or may he give his name and address to the keeper of the restaurant? Suppose, his bill satisfactorily settled, he looks for his hat and umbrella, but finds them gone, must the restaurant keeper make good his loss?

We might here discuss the subject of gratuities to servants. These are the converse of discount, and are given to secure zealous attention from menials. They may weigh upon the conscience of an individual. He may feel himself bound by custom, or in respect of special voluntary service, or in respect of special demands of service, to give some special payment to the waiter. Their legal character corresponds closely to their economical, for they may be so certain a source of income that the waiter in a hotel may dispense with wages, or pay a sum for the privilege of serving—the right to serve, as distinguished from the obligation so to do.

Let us assume that our merchant has again safely reached his office, has duly and smoothly transacted all the business he has on hand, has left to catch a train to take him home, and has arrived safely at the station. On entering the premises of the company new dangers beset him. Stairs, railings, bridges may be defective, or the atmosphere may be dimmed with smoke and steam. If he be a season ticket-holder, the officials may know him to be such, and may let him pass without asking to see his ticket; or if they do not know him, they may accept his assurance of "season" from his respectable appearance, and because there is a great risk of his incurring a serious penalty if he try to travel without a

ticket. If he wish (in popular phrase) to buy a ticket, can the company refuse one? If the train be late, or if it be full, or if he get a place in the luggage van, or stand in another compartment, and if in so doing he be injured, has he any remedy? Could he have insisted on the company putting on an additional carriage, or should he have waited for the next train? If he have a seat in a first-class compartment seated for six, is he entitled to protest against a seventh person coming in and pushing up the dividing arm between two seats? Can he protest against ten persons being accommodated? If an eleventh adult push his way in, can he be excluded or removed? If there be fourteen in already, can a fifteenth enter? If the train start in this crowded condition, has the passenger a claim of damages? Suppose he lose his ticket must he pay again? Is the ticket collector bound to accept his name and address with his assurance, or that of his fellow-passengers, that he had a ticket at starting? Can the railway officials remove him from the carriage for his refusal to pay? If he fail to exhibit his season ticket and if he pay his fare again, can he recover the amount from the company? Although Board of Trade returns prove that railway travelling is safer than walking in the streets of London, yet there is danger in every rail, every fish-plate, every bolt, every point, every wheel, every axle. There may be carelessness in drivers, stokers, guards, signalmen, platelayers, managers, and directors. There is danger from rain, snow, frost, and wind, from trespassing persons or cattle, from malicious third parties. A very small twist to a rail may cause an accident. An invisible crack in a piston rod may break the rod, smash the cylinder, and send the locomotive headlong to destruction. Who then is liable—the company, or the delinquent employee, or the manufacturer who furnished the defective article, or all of them? Or must the injured person go without reparation? If he be killed, who can sue? His wife, children, father, mother, brother, sister?

Let us imagine that he has emerged in safety from the

railway station, has escaped all danger from cabs, butchers' vans, scorching cycles, and all the perils of the street before described, has arrived home and taken an early dinner. He may resolve to spend the evening at a theatre. We might follow him thither in a cab, but we shall not dwell on the special problems, contractual and other, which might be raised. At the door of the theatre is a large crowd. May he crush in? May he be crushed out? If he have a rib broken, what then? If he have a ticket for the stalls and be not in evening dress can the attendants keep him out? Are they bound to return his money, or a portion of it? Having gained admittance, he finds that he has come to a different play from what he expected. Can he demand back his money on the ground of essential error? He finds that the management has substituted one play for another, as the actor whom he specially came to see is unwell. Can he demand his money back? Was he bound to have noticed an advertisement in an evening paper and bills on the walls of the theatre? If he resolve to sit still we may assume he has no remedy. If a lady with an Elizabethan coiffure take up a position in front of him, or if the play be curtailed unusually, can he claim damages? If the "waits" be so long that the performance is protracted, has he any claim? If his neighbours talk during the performance can he have them removed, and if so, when? If they applaud or hiss extravagantly has he any ground of complaint? Is he entitled to hiss while others applaud? Between the acts can he go out for refreshments and re-demand his seat? Can he object to others doing so? Can he object to persons coming back after the curtain is again raised? If he put his hat below the seat, and it be kicked by the person behind, is the latter liable? If he leave his hat and coat outside who is liable if they are lost? If the theatre be draughty and he catch cold is his remedy only medical?

But suppose the crush on his way out presents no difficulty; that there is no question of precedence among cabs or

the claimants for them; that he again finds himself in safety at his own door, what is his title to get in? We have figured the case of an owner who can employ a carpenter to break it open; but he may be a *filiusfamilias* or a guest with only a title by donation, or a lodger with a Puritanical landlady, who thinks theatres sinful and wishes to give him a lesson, can he force his way in or must he go to a hotel and claim damages?

But after all these questions may not arise. He may get admittance and find all the comforts he desires awaiting him, with all necessary and willing service. After supper he may retire to bed in due course. During the night no earthquake may shake the house, no gale throw down a chimney and break his leg, no burglar enter and plunder his goods, no fire rouse him from his slumbers. And so we bring him round to the point where twenty-four hours before he left his bed.

It is obvious that the foregoing sketch might have been crowded still further with detail without exhausting the legal possibilities of a single day in the life of a single individual. There is more detail to be found in a single small room than the most gigantic human intellect can grasp. More legal questions might be raised within a single hour than all the human lawyers who ever lived could solve though they worked to all eternity. We have been trying to enumerate infinity. If we multiply the 24 hours by 3600 seconds, and the product by the number of events that can happen in a second of time, we shall find the number of *cases* that may occur to each civilised man in a day. Then multiply by the 365 days in a year, and by, say, 500,000,000 civilised men, and yet you fall short. You must take the combinations of all these persons, two, three, four, up to possibly all taken at a time. Such numbers defy numeration.

But when we turn to our legal statistics we find that for the twenty-two years from 1878 to 1899 the civil cases of all

kinds brought before all the Scottish Courts averaged 79,957; while the average number of persons apprehended or cited for the five years ending 1898 was 161,965.[1] That is to say, in a population of over four millions, only about a quarter of a million of cases of all kinds reached the Law Courts or the Police Authorities.

Turning to the English statistics for 1899 (Civil, p. 17) we find that there were 1,273,566 proceedings in all the Civil Courts, or 4009·37 per 100,000—slightly over 4 per cent—of the population. The criminal statistics for the same year (p. 11) give 239·34 crimes known to the police and 127·46 convictions for indictable offences per 100,000 of population. Thus, instead of each individual being involved in millions of cases, the cases are not more than 5 to 10 per cent. of the population. The discrepancy between different volumes of statistics and the different ways in which drunkenness is treated and classified show how artificial legal classification must necessarily be.

One other point in the Civil statistics must be noted.[2] Great numbers of cases do not proceed to final judgment. The proportion in the Supreme Court falls not far short of one-half. For the year the final judgments are 26,476 fewer than the actions brought. In England it is the same. The proceedings begun are greatly over one million, the actions heard and determined are greatly under half a million. The power of contract—compromise—is here encroaching even on the sphere of litigation. The Courts encourage this tendency because it saves public time and money; it saves the judges trouble, and, more important still, it may satisfy the parties as well as a judgment would have done.

If we turn to the reports as to the working of the recent Workmen's Compensation Act,[3] we find that Parliament has, as it were, given by legislation a general decision on a general claim by workmen against their employers. The litigation is

[1] Judicial Statistics of Scotland for 1899, pp. 127 and 29. But *cf.* Prison Commissioners' Rep. 1902 [ed. 1278].

[2] Scotland, p. 127, England, Part ii. p. 17.

[3] *Times*, Oct. 22, 1901.

exceedingly small in proportion to the number of cases which occur. The details are worked out by arrangement and arbitration. The statute is a decision working automatically.

The explanation of the fact that while the possibilities of litigation are infinite, the cases which actually come before the Courts are few, is that the views of life here presented are abstract, and, if taken in any other sense, must be pronounced absolutely unreal. We do not go through the world complaining of friction and collision with our fellowmen. As exercise is demanded for the healthy life of the body, so without the friction and collision of society moral life would be impossible. But, on the other hand, just as the life of the body would cease if each pulse of the heart had to be regulated by voluntary action, so the life of the body politic would cease if it were not subconscious and involuntary. Litigation, legislation, and other legal transactions are exceptional phenomena, like the thunderstorms that reveal the existence of electricity in the earth, clouds, and air. The civilised man regulates his life by the golden rule of doing to his neighbour as he expects his neighbour to do to him. The life of the individual is a moral process, and what we call law—the legal aspect—is an abstraction for purely practical purposes. A "case" is a section of a living process, stopped, and abstracted for separate examination. It is, no doubt, related to all that goes before and all that comes after, and it gets any meaning it has from these relations; but right and law, when we regard them as separate phenomena, present themselves to us in the formal abstraction of the case. To the busy merchant, the politician, or the private citizen, law is merely a means to a moral end; and we often see these brush aside technicalities with impatience. But law is a result of social life and has no meaning apart therefrom. It is the mere professional bias, which sees law only in precedents of conveyancing and forms of process, that has gone so far as to define Jurisprudence to be a merely formal science in some special sense.

Just as a photographer can give an appearance of life and movement by making two thousand pictures revolve in one minute before our eyes, so we might imitate living morality by deciding some thousands of legal points and putting them together in close order. If it were possible for a man so to regulate his life, he would not be a living being, but an automaton.

In ordinary circumstances the shipmaster requires to verify his course once a day, and he lays down on a chart a skeleton outline of his course. If he has to take soundings every quarter of an hour his progress is slow. So the ordinary individual gets along in the voyage of life by experience, and instinctive common sense working on that experience, with the continual help and criticism of his fellowmen. Ignorance is no excuse, for the law is an embodiment of common sense. If we had to go to law courts, or lawyers, or even books for guidance, a law-abiding life would be an intolerable burden.

And so we may regard a decided case as a type for guidance as much as the settling of a dispute between parties. This explains why we have thousands of cases in Justice of Peace and Sheriff Small Debt Courts, but only hundreds in the Supreme Courts, and tens in the House of Lords and Privy Council. And here we may find a plea for legal education more thoroughgoing than some persons seem to think necessary. The highest skill and judgment are required for the cases which are regarded as typical, and where the function approaches legislation; but high skill and knowledge of the law, as well as experience of life and affairs, are demanded of men who must sit in Small Debt Courts and dispose of a hundred cases in six or eight hours. Rapidity of judgment is obviously necessary—clear insight and large experience. Nor is this less necessary to the practising lawyer who must be ready to advise a course of conduct on the spur of the moment, with far-reaching results which he may imagine but cannot foresee. What a consulting lawyer decides in five minutes may after-

wards be discussed leisurely and in detail, after elaborate written pleadings and oral evidence, protracted hearings by the House of Lords, and anxious consultations of judges and of the Lords themselves. But the inspiration and intuition of the moment may coincide with the final result. And when a decision has been finally arrived at, perhaps years after the cause of dispute arose, we are apt to sneer at the law's delays. The law does not delay. The parties had to act and did act on some practical line at the time. The final decision is as much for the benefit of the public as of the parties immediately concerned, for as to these, from the moment when a judicial process is started, and so long as it is continued, their interests and the consequent rights are continually changing.

CHAPTER II.

RIGHT.

SECT. I.—NATURE AND ORIGIN OF RIGHT.

A RIGHT may be provisionally defined as a power of acting or forbearing to act, claimed by a person, involving a corresponding act or forbearance on the part of one or more other persons,—recognised, and, if necessary, enforced by society.

All rights ultimately spring from the nervous activity of the human body—acts of appropriation, aggression, motion. The idea becomes legal or jural when similar claims of separate individuals come into conflict, and when society, if necessary, interferes to adjust the difference. There are, then, three—and only three—ways of expressing the relation presented corresponding to the standpoint of each of these parties. Have I a right to do something? Is X. bound to do something? Is it lawful (right in the ethical sense) to do something? Right, Duty, Law are the three sides of an equilateral triangle. You cannot define one side without at the same time defining the two remaining sides and the corresponding angles. But in point of verbal presentment it is possible to treat the subject from one of these standpoints, although as a general rule it is merely a question of clearness in each particular case whether a law should be expressed in the form of a right, a duty, or a statute.

Rights are historically in the first instance concrete. In the notions of dominion and possession of things or creatures, including slaves, right is implicit. If another steal the thing, or the slave try to escape, the claim of right becomes explicit, and the next historical concrete form of right is the right of

action—the first of truly legal rights—"Nihil aliud est actio quam jus quod sibi debeatur judicio persequendi."—(Celsus, L. 51, D. *de O. et A.* (44, 7).)

Rights are ultimately powers to act. Liberty, freedom, or immunity is power to avoid or escape from what is disagreeable or hurtful. A right at rest is merely an abstraction for purposes of examination. We speak of a right to or in a thing. What we mean is a power of acting with regard to the thing. Thus the all-embracing right of Dominium = the jus utendi, the jus abutendi, and so on *ad infinitum*—subject to certain limitations imposed by society and the law. But in ordinary usage right is polarised in the two ideas of thing (interest)—the object of right—or title, the evidence of right; and right, the subjective feeling of claim, idealised in law.

When we come to analyse these legal ideas, we find that they consist of a physical embodiment, *plus* at least three forms of consciousness, or perhaps rather mentality. We have the definite person clothed with the right; the definite person on whom the duty is imposed; and, at least when law reaches its full development, the definite organisation of the State with all its force; together with consciousness in its very widest sense on the part of all three, for often the consciousness is not actual but potential.

In language we may find evidence of how men regarded law and right at various times. We must not assume that right, obligation, and law are definite things, capable of definition. They are infinite and indefinable, but the multiform views taken by men for special purposes are capable of definition. The meaning of words varies with the ideas of the user. One uses a legal term to denote a corporeal thing in which he is interested. Another uses the same word to express an infinite idea which the universe of things could not satisfy. This process of naming is an unconscious abstraction of legal ideas, or at least indicates a knowledge becoming dimly conscious, but not yet consciously analytic and

scientific. In each of the words which we shall examine in our subsequent discussion as typical of leading legal ideas we shall find a physical foundation, a gradual idealising, and in many cases finally a new physical application. Some men idealise corporeal things; others corporealise the most abstract ideas. And still further, man is an individual, who yet represents the whole life of humanity, and so his standpoint continually shifts from one side of the relation to the other, or to a new idea, as being the real unity in the combination of diverse elements—from the corporeal to the ideal, or the ideal to the corporeal, from the particular to the universal, or the universal to the particular. But it frequently happens that the whole body of ideas and historical associations which have grown up around a word may be transferred to another word in a foreign language, as the Romans in evolving their mythology often transferred all the attributes and history of a Greek deity to a native one.

The word "right" may be taken as a type of the most general view of a legal relation from the point of view of the person claiming or demanding the performance of some duty or obligation. It translates for the most part the earlier Latin *jus*, more closely, however, in German than in modern English, and as *jus* is the root-idea of the modern *right*, it is proper to make it our starting-point.

SECT. II.—*JUS.*

(1.) As will be seen from the authorities quoted below, the root from which *jus* comes is the same as that which underlies *jungo*, I join; *jugum*, a yoke; *conjux*, a spouse; *duo*, two; *jus*, broth; and the Greek ξεύγνυμι, I join, and related words. Suarez (De Leg. i. 2, 1) mentions, but rejects, the derivation of *jus* from *juxta*, near, which is obviously not absolutely false. The root-idea is *tying* or *uniting*.

(2.) The word *jus* occurs in the Twelve Tables, and is sometimes translated there as "court." But this term has

misleading associations of officials and perhaps of a building. *Jus* in the Twelve Tables means a judicial transaction or relation. It is the mock combat which superseded the real combat to determine proprietorship. Aulus Gellius and others have preserved for us the archaic formulæ which survived like the flint knives of the Fetiales and the sacred fire of the Vestals—*Si qui in jure manum conserunt:* "If two persons join issue at law."—(Bruns, *Fontes*, 24.) There is here an express uniting in connection with the piece of property which lies between the adversaries. The claimant lays hold of the thing, and so does his adversary. As Gellius explains, instead of coming to close quarters in an actual combat before the prætor, each joined issue in a nominal combat.—(Cic. *Pro Murena*, 26.)

(3.) It means the law laid down in a case, as in the phrases *jus dicere; juris dictio; judex; bonum jus dicis.*—"That is good law,"—Plaut. *Stich.* v. 4, 44.

(4.) It then means the power or right, which is the foundation of the right which may be judicially asserted, if necessary; as, in the ordinary usage, *jus velut utendi, aut utendifruendi, eundi, agendi, aquamve ducendi, vel altius tollendi, prospiciendive.*—(Gaius, iv. 3.) This is the ordinary classical usage, but in its first application it was an emphatic statement that the extrajudicial right was *real*, as compared with the *phenomenal* right in action.

(5.) It then comes to mean a higher power or authority in general: *Sui juris esse; jus necis atque vitæ.*

(6.) It means also the bond or obligation corresponding to the right, the other side of the relation: *ad necessitatem juris ea* [*fideicommissa*] *detraxit.*—(*Inst.* ii. 23, 12). *Qui nullo jure ei obligatus est.*—(*Ib.* iv. 6, 1.) The rubric of *Inst.* i. 12, is ambiguous: *Quibus modis jus potestatis solvitur.*

(7.) It is used metaphorically as a bond in general: *Jus amicitiæ; jura necessitudinis; jus hospitii* (Livy, i. 1).

(8.) From the particular it becomes universalised into law or a system of law: *Jus civile; jus gentium.*

(9.) Plautus uses it to mean what is right and fair—a sort of equity: *Jus petis* (*Pseud.* v. 2, 29); *Jus naturale.*

(10.) It is used for the place where *jus*, particular and universal, is administered and enforced—a law court (Paul, L. 11 D. *de just. et jure* (1, 1)): *Si in rem agebatur, mobilia quidem et moventia, quæ modo in jus adferri adducive possent* (Gaius, iv. 16, *cf.* 29); *Ambula in jus* (Plaut. *Rud.* iii. 6, 22); *Rapit in jus* (Hor. *Sat.* i. 9, 77).

(11.) Finally, it is also materialised in the object of a right, of which we shall find examples in Scots law when we come to deal with "Interest." The following are Roman examples of this usage:—*Nihil est aliud hæreditas quam successio in universum jus quod defunctus habuit* (L. 24, D. *de V. S.* (50, 16)). *Rei appellatione et causæ et jura continentur* (Ulpian, L. 23, *eod.*).

(12.) The plural *jura* means either rights or rules of law (Nettleship, *Latin Lexicography*, *s.v.*; Muirhead's *Gaius*, 522; Smith's *Dictionary of Antiquities*, *s.v.*; Glück, *Pandekten*, i. 1.

SECT. III.—EARLY IDEA OF RIGHT.

But while our modern legal "right" is a translation of *jus*, and springs from forensic sources, the association of right with justice is still more ancient.

The universality of the association between morality, justice, and straightness is very striking. Professor Clark[1] has pointed out that the antithesis of right and wrong is as old as the Vedic hymns. All these words, Latin *rectus*, Gothic *raihts*, Saxon *riht*, German *recht*, Icelandic *rettr*,[2] English *right*, all come from some common root with the primary meaning of physical straightness, and the secondary meaning of moral rectitude.[3]

We find the same in Ancient Egyptian. Dr. Wallis

[1] *Jur.* 79.

[2] Vigfusson and Cleasby, *Dict. s.v.* But *cf.* Bishop Stubbs, *Select Charters*, Glossary, *s.v. Rettarc.*

[3] *Cf.* Brugmann's *Comparative Grammar*, ii. 235, where he refers to the Greek ὀρεκτός, *outstretched*, and the Persian *Rasta*, "upright."

Budge,[1] in describing Maāt, the wife of Thoth, a very ancient Egyptian goddess, says—"There is no one word which will exactly describe the Egyptian conception of Maāt both from a physical and from a moral point of view; but the fundamental idea of the word is 'straight,' and from the Egyptian texts it is clear that *maāt* meant right, true, truth, real, genuine, upright, righteous, just, steadfast, unalterable, &c." After giving examples, he adds—"In the judgment scene two Maāt goddesses appear; one probably is the personification of physical law, and the other of moral rectitude." These ideas suggest the Greek ones of Kosmos and Justice, to which we shall afterwards refer.

Was it a prehistoric metaphysic that associated justice with a straight line, as the Pythagoreans afterwards identified virtues with numbers, squares, and cubes, which last are themselves geometrical forms? Plato associates the geometer and the philosopher, as the Egyptian priests combined the practice and the teaching of geometry and arithmetic with their sacred duties. The later Greek philosophers show traces of mathematical ideas in their treatment of justice. The earlier ideas might well be geometrical, while the Aristotelian ones tended to become arithmetical. Δίκη might be the pointing out or showing (from the root of δείκνυμι, *indico*, &c.), the solution of the difficult problems of geometry and mensuration, to which reference will now be made. The land-surveyor, the geometer, was a judge whose judgments were concrete decisions, the justice of which could be tested by a ready objective standard.

At least two explanations, which fit in with later developments of law, may be suggested. In a country such as Babylonia, subject to periodical floods so great that it has given the world the story of a universal deluge, the office of land-surveyor and the art of delineating and defining boundaries, were of the highest importance. So also was it in Egypt, as we learn from Herodotus and Diodorus, and the

[1] *Book of the Dead*, p. cxix.

mathematical treatises that have reached us. Geometry was almost a sacred mystery. The measuring rod was the tall reed that grew by the river side.—*Qaneh* in old Babylonian and in Hebrew, *κάννα* in Greek, and hence *κανών, canon, a rule*). The simplest way of cheating was to bend the rod; to give perfect justice was to keep it straight—inflexible. We find in Babylonian documents carefully measured descriptions of lands and references to the measurer.[1] The measuring reed and the idea of straightness were adopted by the Jews. The English Bible adopts the word "reed" both as a measure of length and as an instrument in Ezekiel xl. 3, 5-8; xli. 8; xlii. 16-19. The word used in Genesis xxv. 10 and xlvii. 22, &c., for "purchase" of land is said by Gesenius to be from the same root (*Dict. s.v.; cf.* the Latin "pertica," a pole, in its various meanings).

It is noteworthy that the symbolism connected with the Egyptian deities Maāt and Thoth points to measurement in the work of creation and the ordering of the heavenly bodies. Dr. Budge says that the husband of Maāt, "Tehuti or Thoth, represented the divine intelligence, which at creation uttered the words that were carried into effect by Ptah and Khnemu." Thoth is "the measurer," the reckoner of time, and the God of the Moon. Perhaps he did in heaven what the priests did on earth. In the great combat between Horus, the son of Isis, and Set, Thoth was present as judge.[2] All these gods are represented as carrying a sceptre, while others have a flail, as emblems of power and sovereignty.

The hieroglyphic character which represents M in Maāt is a hoe or ploughshare, which may have some connection with the straightness of the furrow, to which reference will be made hereafter.

We may imagine that at a still earlier date men measured the ground either by placing their feet along the boundary one after the other, or by pacing it. It is

[1] Oppert and Ménant, 100, 107, &c.; *Records of the Past*, 1st series, ix. 98, 100. &c.

[2] *Book of the Dead*, p. cxviii.

obvious that considerable care would be required to keep a straight line, and that fraud might easily be practised by making the line crooked. The ceremony of taking off the shoe, described in the Book of Ruth[1] as connected with the transfer of an inheritance or plot of ground, is explained by Keil and Delitzsch as referring to taking possession or sasine by treading the ground.[2] But the ceremony was even then archaic, and its meaning possibly forgotten. Might it not refer to measuring by pacing, the first proceeding to secure fairness being to remove the shoes and give them to the other party to hold ?

The second explanation that may be given of the association of justice with straightness is the setting upright of the boundary stone for private right, or the temple or city wall for public right. This was the work of the king—half warrior, half priest. The British Museum and others contain specimens of these boundary stones, covered with sacred emblems, and curses on those who disturb them. Wrong was throwing down the boundary stone — the landmark. Professor Ridgeway[3] suggests another way of cheating by moving the boundary stones little by little, and quotes the *Iliad*, xii. 421, where the poet describes two men with measures in their hands standing in the common field and disputing about their boundaries.

If, as some scholars suppose, Δίκη be connected with δάκτυλος,[4] digitus, the finger—it may refer not merely to pointing as above suggested, but to the incantation pronounced by the prehistoric conveyancer, judge, or soothsayer, who touched or pointed to the stone.[5]

The earliest Greeks had allotments set apart for each family—inalienable lots of land—while the king had a sacred inclosure specially set apart for himself. The whole city might be regarded as such an inclosure, with its shrine

[1] v. 6-8.
[2] Ruth, *Commentary*, 490.
[3] *Journal of Hellenic Studies*, vi. 323.
[4] Curtius connects this word with δέχομαι, as *Finger* with *fangen*—Liddell and Scott (*s.v.*).
[5] *Cf.* Crawley, *The Mystic Rose*, 84.

of the tutelary deity in the centre. The king with his straight and strong walls was the international guardian of his people against aggression from foreign robbers; and by setting up boundary stones he became guardian of their private rights in the event of disputes among his own subjects. We may find this in the lines of the *Odyssey* (vi. 9-10.)

ἀμφὶ δὲ τεῖχος ἔλασσε πόλει καὶ ἐδείματο οἴκους,
καὶ νηοὺς ποίησε θεῶν, καὶ ἐδάσσατ' ἀρούρας.

The device by which Dido secured sufficient land in Africa has imitators on that continent even at this day. The Greek colonists, with their land-measurers and lots, were denounced by Cicero as land-grabbers.[1]

The commonly accepted etymology of *βασιλεύς* is from *βα* (*βαίνω*) and *λαός*—which makes the root-idea the same as Duke (Dux) and Herzog. But some scholars derive the second part of the word from *λᾶας*—Doric *λεύς*, a stone, though the explanation given is unsatisfactory, that the king, on his election, stood on a stone to show himself to his army (Jebb, *Homer*, 47). May we not regard the Basileus as the builder of the Cyclopean walls of the little Homeric kingdoms at Mycenæ and elsewhere—a tower and a fortress of refuge for his people? The prehistoric Basileus only did what historical emperors and kings have done, but the difficulties which he had to overcome in the transportation of large stones suggested the early title. (*Cf.* Schrader and Jevons, *Prehistoric Antiquities*, 403.)

Perhaps Sanscrit scholars may say whether the Homeric *Fάναξ* is connected with the Sanscrit root "vant"—to divide or apportion. *Ἄναξ* would thus mean the earthly apportioner, corresponding to the unseen *Αἶσα* or *Μοῖρα* who ruled men in general.

It has been suggested that the king's sceptre, "the ensign of kingly power and justice," was the rod of the taskmaster; but it may also have been the measuring rod, by which he settled disputes. Perhaps it served a variety of purposes.

[1] Smith's *Dict. Ant. s.v.* Colonia.

In the Homeric poems the sceptre is golden, like the golden or silvern trowel with which we now solemnly lay the "foundation" stone. We read in the *Iliad*, ix. 97:—

πολλῶν
λαῶν ἐσσὶ ἄναξ καί τοι Ζεὺς ἐγγυάλιξεν
σκῆπτρόν τ' ἠδὲ θέμιστας, ἵνα σφίσι βουλεύῃσθα.

Certainly the collocation of ideas of the ἄναξ, the sceptre and the legal dooms (θέμιστες) is noteworthy. The sceptre is again associated with a legal dispute in the *Iliad*, xxiii. 542 and 568; and xviii. 505; *cf. Od.* ii. 37, where it gave the right of speaking in the assembly.

In the laws of Apastamba,[1] one of the oldest Indian codes, the first duty of a king is to cause a town to be built and a palace in the centre thereof. The religious performance of daily oblations is similar to the Greek and the Roman institutions. The subsequent chapter speaks of granting lands to Brahmanas.

Sir Monier Monier-Williams, in his Sanscrit Dictionary, connects the words *Rijú* (upright, straight) with the Latin *rectus* and the English *right*, but points out that the metaphorical meaning is more common in Vedic, and the literal meaning in classical literature. He connects *Raja* (shining, radiant, a king) with the same root and the Latin *Rex;* and says that *Rájji* (a streak, a line, and according to native lexicographers a field) is probably from the same root. But for such purposes as ours even the Vedas are too modern. The early kingship was not an ornamental but a utilitarian institution. If he is associated with shining or radiant bodies, it is because men used the stars for guidance and for measurement. What struck the earliest observers was the straightness and regularity of their course as they rose and set. The sun that ruled the day, the moon that ruled the night, and the stars, that later were thought to rule the seasons—spring, summer, autumn, and winter—tempest and calm, rose up straight in the sky. Their courses were straight lines before

[1] *Sacred Books of the East*, ii. 161.

they were thought to be circles. They were a pattern to the human king as well as to the private individual, for each kept to its own allotted space.

When the sun looked down on "the broad fields, beholding the rights and wrongs among mortals,"[1] we may take it for granted that boundary disputes formed a large portion of these. Sir Alfred Lyall, speaking of a territory nominally part of the Jodhpoor State, says "the bloody feuds, family and faction fights, and general anarchy caused by . . . . chronic quarrels over the land are incessant."[2]

In the Twelve Tables there was a provision as to the *actio finium regundorum*, and in connection therewith Gaius has preserved a passage from the Laws of Solon (L. 13, D. *Fin. reg.* (10, 1)). Land measuring and surveying run all through the Roman law. The story of Romulus and Remus refers to the solemn ceremony of tracing out the city boundaries with the plough. We may conceive that the *Rex* was the person who founded the city by guiding (*regendo*) the plough. He made the straight line for the city walls and trenches.[3]

Vergil refers to the ceremony imitating the lines quoted from the *Odyssey* above:—

"Interea Æneas urbem designat aratro
Sortiturque domos; hoc Ilium et hæc loca Trojam
Esse jubet. Gaudet regno Trojanus Acestes,
Indicitque forum et patribus dat jura vocatis."—(*Æn.* v. 755.)

It was the usual ceremony in founding a colony.[4] The city was defined like a camp against outsiders. The surveyors laid out the lots for the citizens, and their distribution was decided by lot. The function of the agri-mensores is thus described in a later age by Frontinus:—

"In judicando autem mensorem bonum virum et justum agere decet, neque ulla ambitione aut sordibus moveri, servare opinionem et arti et moribus: quidam enim per imperitiam, quidam per impudentiam

[1] Quoted by Clark, *Jur.* 79.
[2] *Asiatic Studies*, 1st series, 252.
[3] Smith's *Dict. Antiq.*, i. 480; Ramsay and Lanciani's *Antiq.* p. 5; Bruns, 25: *cf.* Lucretius, v. 1108.
[4] Marquardt, *Organisation de l'emp. rom.* i. 168.

peccant: totum autem hoc judicandi officium et hominem et artificem exigit egregium."—(Bruns, *Fontes*, 418.)

In his previous book (*ibid.* p. 414, &c.) Frontinus had set forth fifteen different kinds of controversy as to boundaries and lands. In an agricultural community, and when cities were becoming important, we may feel assured that there was a place both for diorthotic and dianemetic—corrective and distributive—justice. The king or leader had the duty of deciding boundary disputes or putting down trespass, and of distributing new lands or desirable town lots among his followers. So far as we can peer into the darkness of prehistoric times the primitive king had two functions: he set up the walls of his castle or of the city in order to protect the land from foreign enemies, or to keep the sacred *temenos* from ignorant or presumptuous trespassers; and within the city he measured the lands and set up erect boundary stones to mark the property of private citizens.—(*Cf.* Smith, *Dict. Ant. s.v.* Rex: Ihering's *Evolution of the Aryan*, 393.) The *lituus* of the Roman augurs may also have been a measuring rod for the heavens—a sort of spiritual sceptre, as it has become in the bishop's crozier.—(Smith, *Dict. Ant. s.v.*).

When we reach the age of writing the original meaning of "straight" and "right" has been forgotten, and the words have either a legal or a moral significance. We may imagine that as the historic city has given us the ideas of civility, politeness, and urbanity, so the prehistoric one with its high perpendicular walls was an emblem of Right and Justice both to the indwellers and the casual refugees. It was at the gate of the city that justice was dispensed in the East,[1] and the upright city wall appears as Law—as an attempt to restrain revenge—in the Jewish cities of refuge and in the similar Greek ideas as to suppliants in the temples.[2] The *Suppliants* of Æschylus, with its frequent references to

[1] *Cf.* "The Sublime Porte" of Turkey with the etymology suggested for "Mikado"—the august gate: Chamberlain, *Things Japanese*, p. 229.

[2] Gardner and Jevons, *Greek Ant.* 165.

justice, the altar, the palace, and the strong city walls, is instructive in this connection. Danaus says (line 190) that the altar is better than a tower—a shield invulnerable :—

κρείσσων δὲ πύργου βωμὸς, ἄρρηκτον σάκος.

It may be objected that the connection between the boundary stone and the city wall is fanciful. History shows that this is not so. It is simply the difference of a legal and physical sanction as compared with a religious or spiritual one. The Babylonian stones, with their curses and sacred emblems, stand midway between the physical protection of a wall and the spiritual one of law and religion. They were perhaps a more effectual protection to a field than the modern wall with broken glass or barbed wire on the top. Incantations were believed to have a real efficacy by those against whom they were directed, and *a fortiori* by the users, and therefore also by the law.[1] They are dealt with in the Twelve Tables, along with the subjects of boundary and trespass. Vergil, imitating Theocritus, has devoted his Eighth Eclogue to the subject :—

"His [*sc.* carminibus] ego sæpe . . .
. . . satas alio vidi traducere messes."

Justinian found it necessary to repeat in his Code (9, 18) a rescript of Diocletian and Maximian, in which they said—"Artem geometriæ discere atque exerceri publice intersit. Ars autem mathematica damnabilis interdicta est." And at this hour the British Government, with its civilised police, is unable to suppress this superstition under the form of Obeah among the negro population of Jamaica. It is said that planters there sometimes find incantations to be more effective than walls,[2] confirming the opinion put into the mouth of Danaus by Æschylus. There were no doubt walls of mud before stone ones were invented; and even before that epoch men might take refuge on hills and high rocks.

It may also be objected that private property in land is

[1] De Coulanges, *Cité ant.* ii. 6. [2] H. J. Bell, *Obeah*, London, 1893, i.

late of appearing in legal history. Professor Ridgeway holds that it is not known to the Homer of the *Iliad*, though there are traces of its beginning in the *Odyssey*;[1] but the periodical division of the common land of the tribe is sufficient for our purpose. It may also be said that the idea of right in moveable property must have existed in an earlier age.[2] No doubt, but it was in a concrete form; men did not distinguish rights from their embodiment in things and persons. We find leaders dividing spoil among their followers. It was a dispute on this subject that caused the wrath of Achilles. It was this age which has given us such ideas as pecunia—pecus: fee—Vieh; chattels—catalla.

It may also be pointed out that punishment (justification in the old sense) is associated with throwing culprits from high rocks; impaling them on high stakes; hanging them on high gallows-trees; or tying them to upright stakes.

It may be that the moral idea is a generalisation of many concrete ones. The word ὀρθός, for example, meant standing upright, and came to mean just. The brave man stood and faced his foes, while the coward crawled like the serpent—the embodiment of evil. Homicide was a wrong because it laid a man low. Slavery deprived a man of his *status*—a right of standing—and made him kneel or kiss the dust. Man is the measure of the Universe, and naturally extends his own feelings to all things, and expresses moral ideas by personal metaphors. Perhaps one society borrowed the metaphor from another and applied it differently.

SECT. IV.—GREEK TERMS FOR "RIGHT."

It will be more convenient to examine these under the idea of "Justice," but a few observations at this stage as to the history of the Greek words used for the substantive "right" may assist us to follow the parallel development both in English and in the modern Romance languages. In

[1] *Jour. of Hellenic Studies*, vi. 339. [2] Lafargue, *Evolution of Property*.

Classic Greek, "I have right," is represented by ἔξεστί μοι, to which corresponds the substantive ἐξουσία, which is translated in the Authorised Version of the New Testament *power*, and in the Revised Version *right*, and once *jurisdiction*. The phrase δίκαιός εἰμι means "I have a right," as well as "I am bound," and may also apply to a judge giving a decision. This word will be examined at length hereafter; it is referred to here for the purpose of pointing out that τὸ δίκαιον came to mean what satisfies justice, and in Thucydides and Demosthenes approaches the idea of "a right" (Reiskius, *Indices Græcitatis*, i. 240, &c.). Theophilus constantly uses such phrases as τὸ δίκαιον τοῦ ἕλκειν ὕδωρ (*Inst.* ii. 3 pr.) to translate *jus aquæhaustus*, &c. And in modern Greek *jus* and δίκαιον are identified, for they now speak of τὰ δίκαια τοῦ ἀνθρώπου—the rights of man. This Greek word, therefore, like the English "right," has started from the idea of "just," and has reached that of a technical objective "right."

When δίκη became technical, both Homer and Hesiod use the adjective ἰθεῖα, to denote "straight," "just justice," as in the lines:—

ἀλλ' αὖθι διακρινώμεθα νείκος
ἰθείῃσι δίκαις, αἵτ' ἐκ Διός εἰσιν ἄρισται.
—(*Works and Days*, 35.)

In the description of the shield (*Iliad*, xviii. 508), the phrase occurs δίκην ἰθύντατα εἰπεῖν, which is translated by Liddell and Scott, "to give judgment *the most fairly*." Perhaps the words mean "to give the most skilful judgment"—the one that hits the point best, like those of Solomon, Daniel, and Portia. Both Sophocles and Herodotus use ὀρθός in a similar connection, with the meaning of "just."

SECT. V.—*RECTUM*: ANGLO-SAXON *RIHT*: ENGLISH *RIGHT*.

The history of the English word *Right* is the reverse of the Latin *Jus*. Instead of beginning with the physical idea of judicial combat and becoming ideal, moral, and equitable, it begins at the point already indicated with the general idea of

straightness as a moral conception, and ultimately becomes legal and again physical. It may be said generally that the English *Right* has taken into itself two streams of meaning, one from the Roman law, and the other from the Jewish Scriptures through the Christian Church.

(1.) *Rectus* is occasionally used for *directus*, as by Gaius in L. 18, § 4 D. *Commod.* (13, 6), where he uses *rectum judicium* as opposed to *contrarium judicium*. But the associations with *rectus* are both moral and legal; we find it in a short edict of the censors of date 91 B.C. (Bruns, 215).

The word *recte* does not occur in the fragments of the Twelve Tables; but it occurs twice at least in texts of the Prætorian Edict (Bruns, 205). In Classical Latin it is very common, and signifies "duly," "in accordance with right," or "in accordance with rule." From Plautus to Cicero no phrase is commoner than "recte facere," and in deeds of sale and other transactions *recte* was a word of style.[1] Such a word suggests that into the express terms of an agreement there must be read something, either customary stipulations, reasonable or equitable interpretation, or rules of express law. So Ulpian in L. 73, D. *de V. S.* (50, 16): "Hæc verba in stipulatione posita *eam rem recte restitui*, fructus continent: *recte* enim verbum pro viri boni arbitrio est." So *recte* is interchangeable with *jure*, the two words having started from opposite poles, and become by occasional usage identified, while Ovid contrasts "rectum"—justice, equity—with statute law in his description of the Golden Age—

> "Quæ vindice nullo
> Sponte sua, sine lege, fidem rectumque colebat."—(*Met.* i. 89.)

(2.) The Jewish Scriptures have influenced the world through translations. In the Latin Vulgate it strikes the casual reader how seldom the word *jus* occurs, and how frequently the word *rectus*, and more so the word *justus*. In Hebrew the idea of substantive right is generally concrete,

[1] Roby, *Int. to Digest*, 68; Bruns, 259, &c.

and *jus* or *right* is added occasionally by the translators. The Hebrew words for just and right are all connected with the idea of straightness, and generally refer to conduct—the walking in a straight path, turning aside neither to the right hand nor to the left, a figure which we might imagine to be drawn from walking on the balk between the lots of a cultivated field. These words are translated in the Septuagint by *εὐθής* (another form of the classical *εὐθύς*), as well as by *δίκαιος*, and this again is represented in the Latin Vulgate by *rectus*. Thus, the phrase reads like a refrain, "Fecit . . . rectum coram domino" (4 Reg. 12, 2), and the Greek is *ἐποίησεν . . . τὸ εὐθὲς κ.τ.λ.* The same words occur in the Psalms repeatedly—*εὐθής* being translated by *rectus*. When we turn to the Anglo-Saxon Psalters we find a corresponding translation. *Rectus* suggests *riht*, both in pronunciation and meaning. *Justus* is *rihtwis* (English *righteous*). They both apply to straight paths, as well as just men. The daily use of the Psalter in the Mediæval Church, and the fact that churchmen were the lawyers of those days, help to explain how such words and ideas became familiar.

If a Saxon were translating into Latin "gedon riht," he would naturally say "facere rectum," and hence we read in a charter of William the Conqueror, "rectum Deo et episcopo suo faciat" (Thorpe, 213; Melville and Bigelow, 354). And Fleta (*circa* 1290) says: "Quod in jure scripto jus appellatur id in lege Angliæ Rectum esse dicitur" (vi. 1, 1). *Rectum* is rather the translation of *riht* than the old Roman word, but it would be hard to avoid identifying them.

(3.) The meeting-point of the ideas seems to be the phrase "Do right," in the forms of "facere recte," "facere directum," "facere rectum," "gedon riht," "faire droit," &c. This might mean merely to do justice technically. "Shall not the Judge of all the earth do right?"[1] Right may be regarded as the remedy that put straight things that were wrong. But a judge in administering justice may do injustice; in "doing

[1] Vulg. *facere judicium*: Sept. *ποιεῖν κρίσιν*: Gen. xviii. 25.

right" he may do wrong—through ignorance or malice: "Prætor quoque jus reddere dicitur etiam cum inique decernit" (Paul, L. 11, D. *de Just. et Jure* (1, 1)). Right may thus be mere right or righteous right, and as men wish only righteous right they deny the name to spurious imitations. The difficulty of fixing a standard is already felt. Right may be right in the eyes of the claimant, of the respondent, or of a third party (the judge)—*pro boni viri arbitrio.* Mere abstract right does not satisfy men; they wish it embodied in things and acts, and hence right comes to be corporeal—external things that satisfy the idea of right. Extreme examples are the use of *rectum* to signify *tribute* (Ducange, *s.v.*), and of *rights* as meaning *title-deeds.*

The antagonism between the technical Right (Jus) and the moral idea of Justice is similar to the double current which runs through the law of trespass and negligence.[1] The cases sometimes contemplate voluntary damage as sufficient to ground an action, and sometimes they demand moral delinquency.

SECT. VI.—*DIRECTUM—DRICTUM—DROIT.*

(1.) The word *jus* is not directly represented, even in the modern Romance languages. In French its place is taken by *droit;* in Italian by *diritto;* and in Spanish by *derecho.* These are all corruptions of the low Latin *directum.*

(2.) In the *Formulæ* of Marculfus, who lived in the middle of the seventh century, we find the phrase "Faciat directum" (i. 21) in the sense of "do justice."

Ducange (*s.v.*) quotes an oath of the time of Charles the Great, in which the words occur, "Sicut *per drictum* debet esse homo domino suo;" and we find in the oath of Ludwig to Charles the Bald, dated February 842, "Si cum om *per dreit* son fradra salvar dift," *i.e.*, si cum homo per directum suum fratrem salvare debet (Ducange, *s.v.*). Thus in the

[1] Holmes, *Common Law*, Lect. III. and IV.

course of two centuries and a half a new word has come into use to take the place of *jus* in the general sense of law, and has been corrupted into its modern form.

In an instrument dated in 968 we find *directum* used in the ordinary sense of a subjective right—"Quia *nullum directum* habebant de ipsis campis et de ipsis vineis" (Ducange, *s.v.*); the forms *dirittus* and *drictum* also occur.

We should also notice the meaning given by Ducange, but without any example, of the "cry or action whereby one reclaims property which has been unlawfully taken from him by 'disseisin, discontinuance, or ejection;'" and that, at a still later date, "ad directum habere" is used as equivalent to "in jus vocare." The problem is how *directum* came ultimately to supplant *jus* in the Romance languages.

(3.) There is a distinct anticipation of this usage in his *History of the Franks*, by Gregory of Tours, who lived in Gaul at the end of the sixth century, about fifty years after the publication of Justinian's Code. M. Bonnet[1] remarks that the just is compared by Gregory to a straight line—*directus*. Directum begins to take the sense which it has in French of "right"—the law. "Ecce verbum directum habemus," he quotes from a speech of Thierry to the Franks (*Hist. Fr.* iii. 7), and translates, "We have a good right," or, literally, "the just word." So in *Hist.* iv. 14, the phrase occurs, "Verbum directum non habemus." In Ruinart's folio edition of Gregory's works (1699), col. 1392, it is stated that this is a common form of speech with him to signify what may be done lawfully; he does not refer to any passages except the two above quoted.

(4.) We may conjecture that *jus* had become legal, technical, and rigid in meaning. *Directum* was an adjective, with *jus* or *judicium* understood, and indicated just law without evasion, circumlocution, delays, or roundabout procedure. Popular language tends to use adjectives in this way with nouns understood. Now the word *directum* occurs in con-

[1] *Le Latin de Grégoire de Tours*, p. 280.

nection with *judicium* in a speech of Cicero (*Ros. Com.* 4): "Quid est in judicio? Directum, asperum, simplex: si paret HS. IↃↃↃ. dari." In the Imperial legal literature the word was well known. It referred to actions deduced directly from a law, and not evolved by interpretation; to legacies and bequests conveyed directly and not indirectly by a trust; and to legal as opposed to equitable prætorian actions.[1] Craig [2] connects the modern usage of *dominium directum* and *dominium utile* with the Roman distinction of actions. The *dominium directum* may mean a legal as opposed to an equitable estate. The word in its earlier modern usage may indicate a revolt against a lax procedure, when people wished honest straightforward law instead of an equity that might vary with the conscience of every weak or inexperienced judge.

SECT. VII.—MODERN USAGE.

In modern usage the word "right" is generally in English associated with an explanatory synonym. Every Act of Parliament, charter, or deed affords examples. We may take the words in order. The following table shows the association of ideas. A right may be regarded—

1. From the point of view of the claimant in litigation—*Right; action; suit; case; good case; cause; claim; just claim; competency.*
2. From the point of view of the claimant desiring to act extrajudicially—*Right to act; power; faculty; liberty; capacity; status.*
3. As the evidence or foundation of right—*Right; title; just title; complete title.*
4. As the object of claim or right—*Rights; interests; claims; liberties; royalties; dominions; possessions; estate; rights—real and personal, contingent, civil and political,* &c.

[1] Brissonii *Lexicon, s.v.*; Calvini *Lexicon, s.v.*

[2] *Jus Feud.* i. 9, 11.

5. From the point of view of the claimant, considering possible disturbance—*Right; good right; possession; dominion; personality; status; estate.*
6. From the point of view of the judge deciding in a competition—*Best right; privilege; preference.*
7. As special and official rights—*Prerogative; dominion; possession; jurisdiction; privilege; franchise; freedom; liberty, &c.*
8. As negative rights—*Freedom; immunities; liberties.*
9. From the point of view of the state and society—*Right; law; justice; validity, &c.*

But it may be noted here that in all legal procedure, judicial or extrajudicial, it is the concrete physical interest that is dealt with, and must be specified and claimed. So the forms of summonses and petitions in Scotland ask for definite concrete prestations—payment, delivery, possession. "Right" is abstract and implicit. Thus in the Juridical Styles (3rd ed. iii. 134) the style of a declarator of a "right" to property asks declarator of a fact, and a decree for possession, but uses the word "right" as meaning "title" or "title-deeds."

SECT. VIII.—RIGHT; ACTION.

(1.) Action is the earliest form of right—self-help; self-defence. An action is thus physical—driving away enemies—driving cattle (agere—actus).

(2.) When it is recognised and approved by society it becomes a legal "action." *Actio legis* is a proceeding recognised by the oldest Roman laws.[1] What we moderns call an action is an inquiry whether the claimant has a right of (actual physical) action. This is shown by the mode of execution in the Roman law—*manus injectio* and other forms; the Athenian δίκη ἐξούλης and forms of enforcing obligations;[2] the Jewish practice, where even in criminal executions the

[1] Gaius, iv. 11.

[2] Beauchet, iv. 448; Smith, *Dict. Antiq.* i. 630 *b*.

witnesses and accusers commenced the act of stoning ;[1] and by the institution of distress in English law and related systems.

(3.) Tribonian recognised the fact that a person might raise an action without having a substantial right, when he said—"Sabino et Cassio placuerit etiamsi usque ad centum aureos cum eo *agere* velis, *inutiliter te acturum.*"—(*Inst.* iii. 26, 8). In the same section and in the corresponding section of Gaius (iii. 161), "habere actionem" means really "to have a right." As Paul said—"Is qui actionem habet ad rem recuperandam ipsam rem habere videtur."[2] At the same time a person might have a formal right of action and yet have no truly substantial right, or his judicial action might miscarry, and so it was pointed out accurately by Pomponius—"Minus est actionem habere quam rem."[3]

Coming down later, we find a similar usage in Britton,[4] "qe lour *accioun* dure un an et un jour,"—their *right of action* should last a year and a day.

The distinction of right and action and the relations between the ideas were well established by the time of Justinian, when the statement of Celsus was embodied in the *Institutes*,[5]—"Actio autem nihil aliud est quam jus persequendi judicio quod sibi debetur;" and Ulpian repeatedly calls attention to the use of *actio* and related words as covering all formal judicial proceedings, as exceptions—"Reus in exceptione actor est;"[6] and interdicts—"Interdicta quoque actionis verbo continentur."[7] In Gaius *actio* and *judicium* are often used indiscriminately—a practice which would have shocked earlier purists.[8] Actions had become entirely judicial, and had ceased to be extrajudicial.

(4.) In modern usage "right of action" and substantive right may be identified. In *Clarke* v. *The Carfin Coal Co.* (1891), A.C. 412, it was decided that the parent of an illegiti-

[1] Michælis, ii. 302 ; iii. 417.
[2] L. 15, D. *de R. J.* (50, 17).
[3] L. 204, D. *de R. J.*
[4] *Appeals of Homicide*, i. 24, 1.
[5] iv. 6. pr.
[6] L. 1, D. *de except.*, &c. (44, 1).
[7] L. 37, pr. D. *de O. et A.* (44, 7).
[8] Muirhead, *Gaius*, 440.

mate child has by the law of Scotland no *right of action* against a person who has caused its death. The opinions illustrate the uses of the words "right," "claim," "case," and others. Thus, on page 414, it is said by counsel, referring to an earlier decision, that the mother of an illegitimate child has "a title to maintain an action;" while, on page 419, Lord Watson, speaking of the same decision, says that Lord Jerviswoode sustained "the competency of an action of this kind." Both of these expressions appear to be open to criticism. The mother had a "title to sue," because her claim—her alleged right—was due to herself, and she had suffered an actual (though not a legal) wrong in her own person; no other person could have sued for her; it was the law that refused to give a remedy. And the action was in like manner "competent;" it was in the proper court and in the proper form, and if there had only been a right recognised by law it would have been successful. The proper plea was that the pursuer's averments were irrelevant, or, less accurately—though the phrase is common and as old as Balfour's *Practicks*—it might have been said the action was irrelevant. Although the pursuer established all her averments, she could not succeed.[1] Again, on page 417 we find Lord Watson speaking of the law allowing "an action of *solatium* and damages to the parent of a legitimate child," and further on of "the right of action." It is obvious that the action is only a means to an end, and what the parties are interested in is the *solatium* or the damages. Law and lawyers look to the outside proceeding—the action: their client may have an excellent action and make very little profit out of it. In a recent case Lord Alverstone observed that "the right to bring an action" meant "a right to succeed."—(18 T.L.R. 455).

So, again, in the recent case of *Poll* v. *The Lord Advocate*,[2] the plea sustained by Lord Kyllachy was, "The

[1] See Mackay's *Practice*, i. 436. [2] 1897, 1 F. 823.

action does not lie," which was only another way of saying "The complainer has no right." On the other hand, the phrase "an action will lie," as used by the Lord Chancellor (Herschell) in *Magistrates of Edinburgh* v. *Blackie*,[1] means that the remedy is competent.[2]

In the forms used in Scotland for the assignation of bills, bonds, or debts, we find a general grouping of active rights embodied in such a phrase as "With all action, diligence, and execution competent thereanent."[3] This phrase refers to rights in motion, as the phrase "right, title, and interest" applies to rights in potentiality.

(5.) The English idea of a *chose in action* may be taken as an example of the return to a physical usage. It is a right to recover by action, and yet it is regarded as a thing in which the owner has an absolute property (Blackstone, ii. 397).

SECT. IX.—SUIT.

The English term "suit," applied in Chancery procedure, but used in Scotland in a more general sense,[4] comes from the Low Latin *secutio, secta*, and refers originally to a physical following of runaway slaves, or vassals, debtors, or wrongdoers. Speaking of the action for recovery of a moveable, Pollock and Maitland say—"An action we call it, but it is a prosecution, a prosecution in the primary sense of that word, a pursuit, a chase; a great part of the legal procedure takes place before any one has made his way to a court of law."[5] It is easily transferred to the following of the king or judge, and calling out for reparation. In later usage, "non-suiting" implied no right, when the plaintiff was fined for his false claim. And when, at the present day, judgment of non-suit is a bar to any future action, we have a discharge, by force of law, of the alleged right, if it ever existed.[6]

[1] 11 A.C. 671.
[2] *Cf.* Lord M'Laren in Robson *v.* School Board of Hawick, 1900, 2 F. 418; and Ersk. *Inst.* i. 6, 17 *ad fin.*
[3] *Cf.* Jur. Styles, ii. 704, &c.
[4] Ersk. *Inst.* i. 6, 16.
[5] *Hist.* ii. 156.
[6] See Stephen, *Conn.* iii. 560.

But the association of the ideas of pursuing and fleeing are both ancient and widely spread. We find them in ancient Greece, and in the Jewish institution of the avenger of blood.[1]

The Scots term "pursuer" therefore comes from an earlier age than the English "plaintiff."

SECT. X.—COMPETENCY.

(1.) We have alluded to competency. The etymology of this word suggests the idea of something belonging to another thing or person in point of fact. Hence the idea of fitness.

(2.) Competency is the existence of a right recognised by law. So Tribonian says,[2] "Libertas servo competere potest," where the word may refer to the acquiring of a right. And Stair speaks of "Interests and obligations *competent* by nature" (i. 5, 11).

(3.) Lord Watson's use, noted above, of the term is in accordance with Roman classical usage. Many instructive examples will be found in L. 13, §§ 5, 14, 25, D. *de actionibus empti et venditi* (19, 1). These show that the phrase "actio competit" is equivalent to "habere actionem," "agere posse," or the converse, "judicio teneri." That is to say, they express a right as vested in a person in the form of an action.[3]

(4.) "A competent action" in Scots law refers to a particular technical remedy provided by law.[4] This suggests "a competent plea" in defence.[5] Then we apply it to persons and things. "A competent judge,"[6] or "a competent forum," means a judge or a court which has a right to deal with a case—*i.e.*, jurisdiction; or a judge or a court whose aid a plaintiff has a right to invoke.[7]

[1] Hastings, *Dict. of Bible; Encyclopædia Biblica, s.v.* Goel; Smith, *Dict. of Bible, s.v.*, Blood, Revenger of.

[2] *Inst.* i. 5, 1.

[3] *Cf.* Munster *v.* Lamb, 11 Q.B.D. p. 597.

[4] See Mackay, *Practice*, i. 436.

[5] Green's *Encyclopedia, s.v.*

[6] L. 2, D. *si quis in jus vocatus*, &c. (2, 5).

[7] See Smith *v.* Lord Advocate, p. 112, *infra*.

(5.) "Competent," then, means "lawful," as when we speak of "a competent witness," "competentes usuræ,"—lawful interest.[1] It may mean "having formal capacity,"[2] as when an act speaks of a person "competent to dispose by will." This does not refer to mental capacity.[3]

When we speak of an "incompetent judge," or "an incompetent general," we mean one unfit for his post. This usage is not derived from but is parallel to the legal ones.

(6.) Lastly, "a competency" means a fitting income according to some assumed standard of comfort—"a competent provision."[4]

(7.) There are other similar applications of the term. The Ordinance No. 75 of the Scottish University Commissioners (1858) demands from candidates for graduation "a competent knowledge of law." The professional standard may be perhaps what this enactment has in view.

SECT. XI.—CASE.

(1.) "Case" is borrowed from the Latin "casus." *Casus* is an event, accidental, merely happening, for which no person can be blamed:[5]

The original meaning of the word is simply the collection of facts which may give rise to an action.[6] This may in some instances involve the interposition of a person. So Gaius in L. 9, D. *de incendio*, &c. (47, 9), explains "casus" by "negligentia"—importing personal responsibility. Ulpian, on the other hand, opposes "casus major" to "negligentia" in L. 7, D. *de edendo* (2, 13), while in *Nov.* 22, 15 pr., "casus" means "loss." In the technical Scots phrase "casus amissionis" the word means the "circumstances" under which the deed to be proved has been lost.—(Green's *Encycl. s.v.*) So

[1] Code, v. 74, 1; Calvinus, *s.v.*
[2] See p. 71.
[3] Stroud's *Judicial Dict.*, *s.v.*; Finance Act, 1894, s. 22 (2) (*a*).
[4] Stair, i. 5, 7; the Civil List Act, 1901, preamble.
[5] *Cf.* L. 23, D. *de R. J.* (50, 17); Calvinus, *s.v.*
[6] L. 10 D., *de Leg. &c.* (1, 3).

in English procedure we have what is known as an "action on the case."[1]

(2.) It then means the facts as presented by a party. "The appellant has not succeeded *in making out a case.*"[2] That is to say, he has not proved and established a right. From the point of view of the opposite party, we say, "he has "a good answer" or "a good defence."

(3.) Then it means the view taken by the Court of the facts, as it may be said of a pursuer, "He had no case."[3] This is equivalent to the popular phrase "He has no claim," —*i.e.*, he has no "cause of action," no "title to sue," and no "interest." These phrases will be discussed later.

(4.) As a new physical application, we may take the "printed cases" in appeals to the House of Lords.

(5.) At the same time it is possible that the word "case" in Scots practice represents "causa," and not "casus" in Latin.[4] *Regiam Majestatem* uses "cause," "pley," and "action" indiscriminately, but regards them as processes rather than as "rights" vested in a person. The following passage shows how the confusion might arise:—

"Chap. i. Of criminal *causes*, &c. . . . 9. But thift and manslauchter taken up be dittay, sould be determined before the justitiar be an assize of neighbours, because in sic *cases* the King and his justitiar are persewers."

So "casus belli" is explained as meaning "a cause" of war.[5]

SECT. XII.—CAUSE.

The word "cause" has been referred to. Its use in law is technical rather than popular. A cause is an event by or through which another event takes place. In legal usage it is often applied to a title—the ground of a right,—*e.g.*, "Causa lucrativa, veluti ex donatione vel ex alia simili causa."[6]

[1] Ashby *v.* White, 1 Sm. L.C. 231, p. 258.

[2] Per Lord Colonsay in Dunlop *v.* Johnston, Paterson, App. Ca. 1442, 1443; *cf.* "An Equitable Case," 11 A.C. 30.

[3] Houston *v.* Marquis of Sligo, 1885, 29 Ch. D. 452.

[4] See the various readings in *Inst.* iv. 6, 23; *cf.* iii. 24, 3; Gaius, iii. 145, 173.

[5] Calvo, *Dict. s.v.*

[6] L. 6, *Inst. de legatis* (2, 20).

"The plaintiff has been defamed, and has *prima facie* a *cause* of action." These words are used in *Munster* v. *Lamb*, 1883, 11 Q.B.D., at p. 597, and are used interchangeably with "the action is competent," "an action will lie," and others above noticed. The word cause is commonly applied to a judicial process, and is so used in modern "cause lists." "Agere causam" or "defendere causam" may refer either to the putting forward of a *claim* or the discussion of a *title*, or it may regard the judicial process as the cause, and the decree and execution as the effect.

SECT. XIII.—CLAIM.

(1.) The word "claim" comes to us from "clamor" through the Normans. It signifies "a complaint," "a hue and cry," as will be seen from the authorities referred to hereafter.

As "action" points to self-help, so "claim" refers to a "calling out," either to a wrongdoer to do right, or to society to help. "Stop thief" serves both purposes. So Glanvill (i. 5), "Cum clamat quis Domino regi aut ejus Justiciis de feodo," &c. "Quhen anie man compleins to the King," &c.[1]

This mode of asserting and enforcing a private right is referred to in the Twelve Tables, and, if we may coin a word from the obsolete term there used, we may describe it as "obvagulation," when the creditor on every second day (*tertiis diebus*) was allowed to make a disturbance before the door of his debtor. It is known in India, where sitting dharna before the door of a debtor until the creditor perhaps died of starvation, so that his ghost might haunt the unjust debtor, was a recognised mode of procedure until it was forbidden by the 508th section of the Criminal Code (Stokes, i. 291).[2] Fasting was also known in the ancient Irish law to enforce claims, particularly against persons in high position

[1] *Reg. Maj.* i. 6, 1. The word used there is "conqueritur;" but in i. 9, 1, we find "clameum suum faciente."

[2] Balfour's *Cyclopedia of India* (3rd ed.), *s.v.* Dharna; *Code of Gentoo Laws*, London, 1777, p. 19.

(Senchus Mor, i. 113 (Rolls Ser.)). The creditor waited before the door of his debtor for a certain time, and if he did not receive a pledge he got double the debt and double food.

(2.) These modes of enforcement were an indirect appeal to public opinion. They prove that the idea of right exists in some form prior to the existence of an organised State.

When the State is organised with a king as its head, the call for redress is to him. This is familiar in the East, and was common in early times in England.[1] It survives in the modern appeal to higher Courts. Whereas the old English appeal (*appellum*) was a criminal proceeding against an individual, the appeal (*appellatio*) to a higher Court came to us through the Roman and the Canon law.

(3.) The "hue and cry" was early adopted as a criminal process, and was in England imposed as a duty on citizens. Balfour (*Practicks*, 522, 525) speaks of the "lauchful shout," and of the "clamour and shout of the nichtbouris." The use of the words "pursuer" and "suit" connect the ideas with civil procedure.

(4.) A claim, like an action, becomes formal—a legal claim. So

> "Claim is a challenge of interest in anything that is in the possession of another, or at least out of a man's own possession." "Continual claim is where a man hath right and title to enter into any lands and tenements whereof another is seized in fee or fee tail" (Tomlins' *Dict. s.v.*).

Scottish lawyers speak of claims in an action of multiplepoinding, where several persons put forward competing rights to a single fund or object. It is interesting to note how the various meanings of "claim" shade into one another in such procedure (Mackay's *Practice*, chap. lxv).

A claim may be formal and yet false in substance. It has been said "That the demandant be in mercy for his false claim" (Roscoe, *Real Actions*, i. 329).

But to claim is "to demand as one's own or as one's due;

[1] Stubbs' *Select Charters*, *s.v.*; *cf.* Spencer, *Sociology*, ii. 88, 496, &c.; Maine, *Law and Custom*, 160, 185; Newberry, *Life of Rekhmara*, 36; Smith, *Dict. of Bible*, *s.v.* Judge.

to seek or ask on the ground of right." Such a claim is a legal claim—a just claim. Thus under section 2 of the Agricultural Holdings (Scotland) Act, 1883, it is provided that on certain conditions "the tenant . . . may claim compensation . . . in respect of improvement,"—*i.e.*, he may claim it successfully and receive payment of a sum (46 and 47 Vict. c. 62, sect. 2; *cf.* sect. 7, and p. 53, *supra*).

(5.) So a claim comes to mean "a right of claiming." Dr. Murray (*Dict. s.v.*) quotes an old example as from an Act of Henry VII. c. 20, section 7. The following formula from Dallas' *Styles* (ii. 457) long survived in Scottish conveyancing:

"Together with all right, title, interest, both property and superiority, and other right, title, interest, *claim of right and possession*, as well petitor as possessor, whatsoever, which I, my predecessors and authors, heirs and successors, had, have, or any ways may have, *claim, or pretend* thereto," &c.

(6.) *Right* and *claim* are often interchangeable; a claim being a right in motion, put forward and asserted. In *Clarke* v. *Carfin Coal Co.* (1891), A.C., at p. 417, we find examples where the word is used, varying from a recognised right to a mere pretence. And in section 55 of the Naval Prize Act, 1864, we find both "claim" and "interest" applied to the right of officers and men to share prize. The "Court of Claims," in connection with the coronation of the British monarch, deals with alleged rights to undertake duties thereat (see *London Gazette*, 3rd July 1901).

In regard to the claims or rights of *jus relictæ* of a widow and legitim in the case of children, the words are practically interchangeable. *Jus relictæ* and terce are spoken of as "legal claims."[1] But the phrase is used in other cases also, *e.g.*, in *Baird* v. *Bell*, the right to exact payment for use of a common gable is spoken of as "a legal claim against the owner" (1898, A.C., p. 429). So again—

"Where the Sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel, either against

[1] *Cf.* M'Laren on Wills (1st ed.), i. 626; Jur. Styles (5th ed.), i. 503; M'Onie *v.* Whyte, 1890, 15 App. Ca. 158 and 159.

the Sheriff or the purchaser from the Sheriff."—(*Castrique* v. *Imrie*, L.R. 4 H.L. p. 428 ; Blackburn, J.)

In *Studd* v. *Cook*, 1883, 8 A.C. at p. 597, Lord Watson said—

"Any words which, in a settlement of moveables, would be recognised by the law of Scotland as sufficient to create a *right or claim* in favour of an executor, grantee, or legatee, must receive effect if used with reference to lands in Scotland. Thirdly, words sufficient to create a right or claim to moveables are, when used in reference to lands, declared to be equivalent to a 'general disposition' of such lands."—(*Cf.* the provisions referred to,—the Titles to Land Consolidation (Scotland) Act, 1868, sect. 20.)

The case of the *North British Railway* v. *North-Eastern Railway*, 24 R. (H.L.) 19, gives an example of "claims" far in excess of "legal rights."

(7.) With regard to the Crown, rights may be regarded either as at rest (mere rights) or in motion (as claims), as may be seen from a comparison of the two following passages :—

"The King, though he may, by a special pardon, secure the offender from public justice, the exercise of which is a *right* of the Crown, cannot discharge any private *interest*, arising to the party hurt, against the criminal, or cut him off from his *claim* of damages."—(Ersk. *Inst.* iv. 4, 105.)

"Lands of gavelkind tenure do not escheat upon an attainder for murder, but descend to the heir free from the King's *claim* to a year day and waste."—(Bythewood and Jarman's *Conveyancing*, 4th ed. i. 141.)

In modern British law the rights of the Crown are closely assimilated to private rights, but in the Sovereign we may conceive that right and claim absolutely coincide, for the supreme power would not claim if it had no right; and when it does claim it has power to make the claim absolutely effective. But such conceptions bring us to the region of metaphysics.

(8.) The term *claim* is used in international affairs, probably because there is in general no means of enforcing claims except by the goodwill of the Government which is the alleged debtor. Possibly the reason why such rights are

called claims is the tendency to exaggerate a small kernel of right, which is so common when railway companies and corporations are debtors. The element of imagination bulks so largely that these claims often appear to the alleged debtors to be mere claims, and nothing more. Thus, in a Treaty of 20th November 1815 for the liquidation of claims upon the French Government (Hertslet, *Europe*, 378, at p. 391), Art. xvi. provides—

> "Governments who have claims to prefer in behalf of their subjects engage to cause them to be presented for liquidation within a year . . . after which time they are to forfeit all right to claim and recovery."

The Treaty of Washington of 1871 was concluded for, among other things, the settlement of the "Alabama claims," "growing out of acts committed by [certain] vessels," and certain other "claims" "arising out of acts committed against the persons or property of citizens of the United States" (Art. xii.). In the Treaty itself claims are treated as being put forward by individuals, not by the State itself.

So in the House of Commons, on 24th February 1898, Mr. Chamberlain spoke of "the Hinterland, to a part of which we consider we have a most undoubted claim." Perhaps this suggests that the alleged right may be disputed by others. Again in the dispatch of Sir Edmund Monson to M. Hanotaux of 10th December 1897 we read, "They must not be understood to admit that any other European power than Great Britain *has any claim* to occupy any part of the valley of the Nile. "Claim" is translated by "droit" in the French Yellow Book (1897-98), p. 2.

(9.) And, finally, the word comes to physical usages. In America, Australia, and Africa "a claim" means the area claimed and allotted to a miner—that which is claimed;[1] or it may mean sums payable under a claim, as "claims fall in."[2] This usage is mediæval (Ducange, *s.v.*), for a man may

[1] Palmer's *Precedents*, 7th ed., form 41, s. 2; 8th ed., form 47, s. 1.

[2] Per Lord Kinnear in Smith *v.* Lord Advocate, 1899, 1 F. p. 746.

speak of "clamores meos," *i.e.*, the claims *against* me and not *by* me. "Clamor" here is explained by *debitum*. It is also used in Scots legal procedure for the document lodged in making a claim in an action of multiplepoinding or competition (Mackay, *Practice*, ii. 109). This usage corresponds to that of "title" and "obligation." It is evidence of a claim.

SECT. XIV.—POWER.

In the age of self-help right and power were necessarily identified. "Action" suggested either the recognition of private power or the placing of public power at the disposal of the individual. "Claim" suggested the helplessness of the individual by himself.

(1.) Power is undoubtedly used at first in a physical reference, and so are the words "posse" in Latin, "*δύνασθαι*" in Greek, and "can" in English. But it assumes a technical signification when it means not mere power, but power recognised by the State. The change is from mere ability to act, "capacity" or "faculty," to "authority." For example, Ulpian says, "In factum actiones etiam filiifamiliarum *possunt exercere*" (L. 13, D. *de O. et A.* (44, 7)). This refers to an individual right. On the other hand, Pomponius says, "Actiones adversus patrem filio præstari *non possunt*," &c. —(L. 7, *eod.*). This refers to the general law (right). The long extract from Paul's work on the Edict, L. 4, D. *de usurp. et usucap.* (41, 3) might be quoted *in extenso* as an illustration of both usages. So in Greek Ὁ *μαινόμενος οὐδὲν συνάλλαγμα ποιεῖν δύναται* (Theophilus iii. 19, 8): "furiosus nullum negotium gerere *potest*"—(Gaius, iii. 106, *Inst.* iii. 19, 8).

This is common also in modern usage, thus:—

"A subject superior . . . *cannot* dispose of [his superiority] by a subaltern grant."—(Ersk. *Inst.* ii. 5, 4.)

"No patron *can* present to the expectancy of a benefice; for that *right* arises only upon the death, &c. of the former incumbent."—(*Ibid.* i. 5, 11.)

In mediæval charters we find *potestas* qualified by such terms as *legitima, libera, juridica,* &c.—(Charters of Abbey of Cluny,—see p. 97, *infra.*)

(2.) *Power* and right may be identified. Savigny (*System,* sect. 4) defines a right as "the power justly appertaining to the individual person." Thus Boc-riht (Thorpe, *Anc. Law of Eng.*, 185) means the power of testing, and copyright, the legal power of multiplying copies. The interpretation clause (sect. 3) of the Titles to Land Consolidation (Scotland) Act, 1868, refers to decrees "appointing persons to exercise or enjoy the *rights or powers* conferred," &c. Perhaps the most common example of this usage will be found in the "powers" of trustees. These may be private and extrajudicial, or they may be specially granted by the Court. In Chapter LXIII. of Lord M'Laren's work on Wills and Succession (3rd edition) we find these powers discussed. They are spoken of as *rights* (sect. 2203), and the terms "authority" and "privilege" also occur. In fact this chapter gives examples of all the terms "liberty," "entitled," "may," "can," which are associated with the idea of right.[1]

(3.) We must now notice a technical usage which Scotland has recently borrowed from England:—

In English law "a power is an authority reserved by or limited to a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others. The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership."—(Farwell on *Powers*, p. 1.)

"Powers after the statute [of uses] still remained as mere *rights* of designation."—(Sugden on *Powers*, 18.)

In the Bankruptcy (Scotland) Act, 1856 (sect. 4), "property" and "estate" are defined as including "powers." This suggests physical associations and connects the idea with *interest.* This use of the word "power" is somewhat wider than the older Scots use of the word "faculty."

(4.) But the word "powers" is more commonly applied to official rights, as in the Act 60 Vict., cap. 11, sect. 4—

[1] *Cf.* the use of *vis, ultra vires,* &c. (Brissonius, *s.v.*).

"From and after the passing of this Act, there shall vest in the Secretary of State in Council of India all *rights*, *powers*, and authorities, discretionary or otherwise, which were, prior to the passing of this Act, vested in the Trustees of the regular Widows' Fund and the Elders' Widows' Fund respectively."

"Rights" may here refer to property and money, "powers" to rights of acting—passive and active capacity.

The Local Government (Scotland) Act, 1889 (section 105), defines "powers" as including "rights, jurisdictions, capacities, privileges, and immunities." Throughout this Act "powers" are always associated with "duties."

The rubric of section 13 of the Agricultural Holdings Act, 1883, reads—"*Power* to proceed in absence," while the clause itself provides that the referee "*may* proceed in absence" (see also section 12). In section 16 "powers as referees" and "powers of the Sheriff" occur with reference to what may be termed "jurisdiction." Indeed Erskine (*Inst.* i. 2, 2) describes jurisdiction sometimes as a "right," and sometimes as a "power" (*ibid.* i. 2, 6, &c.)

(5.) "Power" is also applied to a delegated right of legislation. According to the rubric of section 51 of the Titles to Land Consolidation (Scotland) Act, 1868, "power" is given to the Court of Session to pass Acts of Sederunt; while the section reads—"It shall be *competent* to the said Court, and they are hereby authorised and required," &c. But wherever an individual or a group of individuals are regarded as part of the organic unity of the State, they may be treated as having rights which are denominated powers. Thus the British Legislature makes laws such as the British Settlements Act, 1887, dealing with the powers of the King in Council, or the Appellate Jurisdiction Act, 1876, dealing with the powers of the House of Lords.[1]

(6.) Powers enjoyed or conferred for the benefit of others or for the public may become "duties;" "may" generally

[1] *Cf.* Commonwealth of Australia Constitution Act, sect. 9, chap. I., part V.; Pupils Protection Act, sects. 9 and 24 (repealed), 33, 40, &c.

means "must,"—that is to say, official rights imply the duties of the office in question.

"Statutes," says Maxwell, "which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy, when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may,' or 'shall if they think fit,' or 'shall have power,' or that it 'shall be lawful' for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases the authorised person is invested with a discretion, and then those expressions seem divested of that compulsory force."—*On Statutes*, 3rd ed. p. 334.

In these last cases the person has a power and a right of acting depending on his own discretion—judicial, so to speak. The obligee in the one case can insist on performance; in the other, if the holder of the power act, he must do so in accordance with justice, or, it may be, definite legal rules. It may be noticed that the phrase "it shall be lawful," equivalent to "may," looks at the relation from the point of view of the State. This means that the law and the State will recognise and enforce such and such action on the part of the holder of the right.

(7.) By the Roman lawyers *potestas* was also used as meaning a group of rights, as we shall see "estate" and other words used in the modern law. So Paul (L. 215, D. *de V. S.* (50, 16)) says it was equivalent to *imperium*, *patria potestas*, or *dominium*, according to circumstances. Justinian can speak of *jus potestatis* as if the *patria potestas* were the object of a right.[1] The use of *manus* was similar.[2] We may see a similar usage in the "running powers" of railways. These are objects, as when Lord Watson speaks of the "right to exercise them," and imply a variety of rights to act.—(*N. B. Railway*, 1896, 24 R. (H.L.) 29.)

(8.) And here, as elsewhere, we return to another physical

[1] *Inst.* i. 9, 2; *cf.* Gaius i. 55. [2] Hunter's *Rom. Law*, 188, 223.

use of the term, in the common application of the term "power of attorney" to a deed conferring powers. The diplomatic use of the term "full powers" approaches this.

(9.) Finally, we notice the tendency to personify power in the persons vested therewith—"the powers that be," "potentates." And the equally common personal reference in "the Great Powers" of Europe points to the physical force at the bottom of all law. "Doubtless the supreme *power* is, in the general case, the fountain of jurisdiction."—(Ersk. *Inst.* i. 2, 3.)

(10.) Notwithstanding Bentham's objection,[1] it seems quite usual to employ right and power interchangeably. He seems to err in suggesting that if we have "a right to the services of a magistrate" we have "no power over him; all the power is on his side."

In the first place, it may be pointed out that our power is over ourselves to apply to him for his "services." It is this power which is popularly recognised, and so legalised. In the second place, by means of appeals and complaints, we may even have power over the magistrate himself. The importunate widow exercised her power directly. A strong and able counsel does the same in every-day experience. The right of appeal and the known power and will to exercise it are potent weapons in the weakest hand. Popular usage has no difficulty in attributing power to every individual, even the humblest subject, to judges and rulers, inferior and superior, to the king himself, to bodies of legislators and cabinets, the power (both physical and legal) corresponding in some sense to the position of the person. The power becomes legal when approved and supported by society. But if the individual is helpless by himself, until supported by society, can power be really affirmed in regard to him? We reply that, without the power of individuals, society could not exist even in name. The point raised by Bentham,

[1] *Morals and Legislation*, 224. *Cf.* Hearn's distinction of Right, Power, and Liberty in *Legal Rights and Duties*, 146-150.

although regarded by him as one of correct verbal usage, is truly one of metaphysics. What is the *ultimate* power, and where does it reside? The common sense man, with whose view alone we are here concerned, finds a provisional answer suitable for all practical purposes.

SECT. XV.—FACULTY.

(1.) *Facultas* (connected with *facere*, to do, *facilis*, easy) signifies "means," "possibility," (non-legal) "power."—(Roby, *Int. to Digest*, 75.)

"Usufructus legari potest jure civili earum rerum, quarum salva substantia utendi fruendi potest esse *facultas*."—(Ulp. xxiv. sect. 26.)

". . . non optulit pecuniam. Quid si tunc *facultatem* pecuniæ non habuit . . . ?"—(Paul, L. 73, D. *de proc. et def.* (3, 3.)).

"Item si quis *facultatem* restituendi non habeat . . ."—(Ulp. L. 5, § 6 D. *ad exhib.* (10, 4.)).

". . . et respiciunt ad *facultatem* dandi. Est autem *facultas* personæ commodum, incommodumque, non rerum quæ promittuntur."—(Venuleius, L. 137, § 4, D. *de V. O.* (45, 1.)).

In all these cases *facultas* means actual physical power.

(2.) When this power is recognised or reinforced by the State it becomes "legal power" or "right." So Gaius (*Inst.* ii. 163) [si adierit hereditatem] "postea relinquendæ hereditatis *facultatem* non habet." And Paul commences his book on the Lex Falcidia with these words—"Lex Falcidia . . . liberam legandi *facultatem* dedit usque ad dodrantem" (L. 1, pr. D. *ad Leg. Falc.* (35, 2)) while the law itself, which he proceeds to quote, uses the words, "Jus potestasque esto." In the texts—L. 22, D. *de cond. inst.* (28, 7); L. 18, § 2, D. *de damno infecto* (39, 2)—we find *facultas* used along with *potestas* or the verb *posse*. We may compare in this connection the modern use of the three adjectives, "Facultative," "Potestative," and "Competent." We speak of a rule as being merely *facultative* (Guthrie, *Savigny*, 2nd ed. p. 324)—*i.e.*, as conferring a right without implying an obligation on the holder; a *potestative* condition (Bell, *Prin.* 50) depends on the will of a party; while a *competent* action is

one which a party is entitled to raise (p. 55). So a *res* (*jus*) *meræ facultatis* is a right which is not lost by non-user.—(Bell, *Prin.* 999, 2017.)

(3.) The Latin word returns to a physical usage as applied to things or property over which a person has power —pecuniary means. So Gaius (ii. 154), "Qui facultates suas suspectas habet;" and in the Decretals of Gregory IX. (v. 40, 33) we read, "Quia non sufficiebant ecclesiæ facultates."[1] This still survives in English and American law.

"In the law of alimony . . . it signifies in its plural form the earnings, income, fixed property, or anything else, which the Court takes into consideration in determining the sum or sums it will award for alimony, whether temporary or permanent."—Bishop, *Marriage, &c.*, ii. s. 888 (*cf.* Browne and Powle's *Law of Divorce*, 6th ed. 259).

(4.) In Scots law "faculty" is used as equivalent to "power" in the technical English sense formerly explained. Thus Lord Kilkerran describes a faculty to burden as "a real right."—(1 Bell's *Com.* 41). Bell himself defines a faculty reserved to the granter as an estate,—showing the transition to the physical idea (*ibid.* 39; Ersk. *Inst.* ii. 12, 6). Such a faculty is a right, and so Lord M'Laren (Wills, sect. 2035) can speak of "an estate over which the disponer has only a *jus facultatis*."

(5.) In English Ecclesiastical law the word "faculty" is of frequent occurrence. Dr. Ayliffe (*Parergon*, p. 221) points out that the granting of a faculty or licence is "not a dispensing with the law, but an execution and observance thereof." It is possible for an individual to obtain a grant of a chapel or a pew in a church by faculty of the ordinary—a high judicial officer or dignitary, *e.g.*, the Bishop.[2] In *Halliday* v. *Phillips*, 1889, 23 Q.B.D. 48, the word "faculty" is used in this connection along with "right," "title," and even to denote the actual deed of grant. So again—

"The chief officer of the Archbishop of Canterbury is the Master

[1] *Cf.* the classical use of the word *vires* (Brissonius, *s.v.*).

[2] Stephen, *Comm.* ii. 710.

of Faculties, to whom applications are to be made for the admission or removal, under special circumstances, of notaries"—(Phillimore, *Eccl. Law* (2nd ed.), ii. 945.)

The English licence to marry without banns is the most familiar example of this usage.

(6.) In the Middle Ages the word "facultas" came to mean a body of masters or doctors in liberal arts who had the power of teaching and conferring degrees. The word is used in this sense in the Bull of Pope Nicholas V. founding Glasgow University, and it also occurs there, *first*, to express, along with *potestas*, the power of the Archbishop as Rector, after the pattern of Bologna; and, *secondly*, to express the power of reading and teaching given to graduates. Popularly, the medical profession is spoken of as "The Faculty."

Again, in the Faculty of Advocates, the Faculty of Procurators, the Faculty of Physicians and Surgeons, the word has come to mean an artificial person, a corporation—like College in England.

(7.) Grotius (*De J. B. et P.* i. 1, 4, &c.), after explaining a right (*jus*) as being a moral quality belonging to a person to hold or do something justly, goes on to explain that when the moral quality is perfect it is called "facultas" as opposed to "aptitudo"—a fitness or moral claim. He prefers to call *facultas* strict right (*jus strictum*), and says that this includes power; if over one's self, liberty; if over others, authority, as of a parent or master; if over things, ownership, dominion, full or less (as pledge, &c.).

Leibniz appears to refer to this passage when he distinguishes the degrees of right which spring from the right of nature. He contrasts the three ideas of strict law (*jus strictum* or *facultas*) equity and probity, each corresponding to one of the three maxims—"Neminem lædere, suum cuique tribuere, honeste vivere."—(*De notionibus jur. et just.*, Erdmann, p. 119; Latta's *Leibniz*, p. 288.)

SECT. XVI.—CAPACITY; ABILITY.

(1.) Capacity (from *capax, capere*) refers physically to a power of holding, as when we speak of the capacity of a vessel:—

"Vasis argenteis legatis, ea omnia continentur, quæ capacitati alicui parata sunt."—(Paul, *Sent.* iii. 6, 86, Huschke's ed.)

(2.) "Capax" and "capacitas" were applied by the Roman jurists to the power or right of taking an inheritance. In Ulpian's *Rules*, tit. 16, the added rubric "De capacitate" is represented in the text by the words "capere possunt."[1]

(3.) In modern legal usage it is applied to a right more or less generalised. It is power or ability to possess or exercise rights. Thus in the rubric of the 6th section of the Naturalization Act, 1870, we find "*capacity* of British subject to renounce allegiance to Her Majesty," while the rubric of section 3 speaks of "*power* of naturalised aliens to divest themselves of their status."

Capacity to contract or to enter into legal relations refers to conditions imposed by the law, which may be the basis of a concrete right.[2]

Capacity in its first conception is something understood to reside in the person, which conferred "capacity" in a legal sense,—*i.e.*, a right or power to contract, to test, to inherit, to marry, &c. The later conception is that of one or more external physical conditions, such as age, sex, health, credit, and such like, or rules more or less arbitrarily imposed by a society, which are the foundation of the legal capacity or right. It is the former view which prevails when capacity is made to depend on the *lex domicilii*, and the latter when it is made to depend on the *lex loci contractus*.[3]

(4.) Capacity is an external physical condition—a char-

[1] *Cf.* L. 55, D. *de leg. et fid.* (31), and L. 29, D. *de lib. leg.* (34, 3).

[2] *Cf.* Code civil français, iii. 2, 2; Guthrie's *Savigny, passim;* A. Weiss. *Dr. Int. Pr.* iii. 296; Bills of Exchange Act, 1882, sect. 22, where we find the words "capacity or power to incur liability."

[3] *Cf.* Dicey, *Conflict of Laws*, 543, 701.

acter, as Erskine (i. 6, 1) speaks of "persons in their private capacities, husband or wife," &c. We speak of a person employed in the *capacity* of a servant,—(32 and 33 Vict. c. 14, sect. 19 (3)). This capacity points to duties and obligations rather than rights.[1]—(Brissonius, *s.v. Capax.*)

(5.) We have described capacity as ability. This word, though less common, has a similar history. It comes from the Latin *habere*, to hold. "Ability" may mean legal power. "A disability" is an incapacity. *Habili modo* means "in a *competent* manner."—(See Sussex Peerage Case, 11 Cl. & Fin. at pp. 92, 93: Calvinus, Ducange, Skeat, Stroud, *s.vv. Habilis*, &c. *Cf.* Erskine's use of the words "power," "right," "capable," "disability," &c. in *Inst.* iii. 10, 6.)

SECT. XVII.—STATUS.

Status is a term similar to capacity. It refers originally to the *persona standi in judicio*—a general right to appear in court in vindication of material rights. Now the usage is extrajudicial. As Austin expresses it, "a status is a set or collection of various rights or duties, or of various capacities or incapacities to take or incur rights or duties."—(*Jur.* 725.) Both "capacity" and "status" group the rights round the person as a subject, while "estate" and the other phrases to be afterwards noted, group them round the object.—(Sect. xxi. (6) *infra.* Naturalisation Act, 1870, sect. 17, where "disability" is defined as a "status.")

It is the same word Status, which, like Liberty, has become universalised and personified in the modern "State," which itself represents and enforces law and all particular rights.—(Pp. 95, 124, *infra.* Prof. Maitland, *Gierke's Political Theories of Mid. Age*, xxv.).

SECT. XVIII.—TITLE.

(1.) Title is originally a mark or ticket. It is commonly

[1] *Cf.* Ersk. *Inst.* iv. 4, 6; Trayner's *Maxims, s.v.* Capax doli.

applied to the inscription at the beginning of a book, indicating the subject and perhaps the author, or to the headings of the divisions of the Digest and our older legal treatises.

"And Pilate wrote a title and put it on the cross."—(St. John xix. 19.)

"Tell me once more what title thou dost bear."—(*Merchant of Venice*, ii. 9, 35.)

If, as suggested by Lewis and Short, it is connected with the root $\tau\iota$ in $\tau\acute{\iota}\nu\omega$ and $\tau\iota\mu\acute{\alpha}\omega$, we may suppose that it was first applied to the written incantation placed on a piece of property by the prehistoric conveyancer for its protection. The incantation made property *sacred*, and so "completed a title."—(*Cf.* p. 38, *supra*.) According to Ducange, "titulus" refers either to the boundary stone, or the inscription thereon.

The transition from the popular to the legal usage is illustrated by a constitution of Theodosius and Valentinian, embodied in the Code of Justinian (ii. 16) under the title "Ut nemo privatus *titulos* prædiis suis vel alienis imponat vel vela regalia suspendat." What was forbidden was the placing of "signs" of ownership on property without judicial authority.—(*Cf. Novel.* xvii. 15.)

(2.) In legal usage it is defined as a "cause" of possession.—(Brissonius, Calvinus, *s.v.*). A ticket on an article exhibited "sold," a ticket on a seat in a theatre "engaged," a card or a hat on a seat in the House of Commons, suggest the association of ideas.[1] The fact of having marked (titled) the seat constitutes a *legal* "title"; other persons respect it, and the authorities keep the thing or the seat and so enforce the right. So Ulpian (L. 13, § 1, D. *de hered. pet.* (5, 3)) says, "Omnibus etiam titulis hic 'pro possessore' hæret et quasi injunctus est. Denique et 'pro emptore' titulo hæret," and so on in other cases given. The "titles" of purchaser, heir, possessor, are "causes" of possession.

[1] In Scotland the word "ticket" was formerly applied to obligations like bills; (Ross, *Lectures*, i. 45); or to Leases (Montgomery Act, 10 Geo. III. c. 51.)

(3.) The following passage illustrates the modern use of *title* as the foundation of a right of property:—

"Nullo justo titulo præcedente possidentes ratio juris quærere dominium prohibet."—(L. 24, C. *de rei vind.* (3, 32).)

It may also mean "a cause" of transfer of property. G. J. Bell thus explains this later usage:—

"Lawyers distinguish in transference the *titulus transferendi dominii* and the *modus transferendi dominii:* the former being the conventional will to convey; the latter the overt act by which the real right is transferred."—(*Prin.* 1299-1300.)

This distinction was of importance in the former law of sale, but is now generally regarded as of little practical use. —(Holland, *Jur.* 149.)

(4.) In judicial proceedings we find the phrase "titulus actionis" opposed to "causa debiti"—the former referring to the merely formal ground of action, or the mere form of action, the latter to the substantive merits.—(L. 69, D. *de fidejuss. et mand.* (46, 1)).

"A title to sue" appears to be a Scotticism founded on the Roman phrase "titulus actionis," just quoted; it is very often used when "a right of action" is meant. This appears to be the case in *Edinburgh United Breweries*.[1] The Lord Chancellor (Herschell) treats the case as one of right, Lord Watson as one of title. The following sentence of the Lord Chancellor's opinion (p. 109) stands midway:—

"Would Dunn . . . come into Court and say, 'I am entitled to claim that this contract shall be reduced?' It is said that he has that right because, although he has parted with the property, the persons who are the present owners of the property, and who took from him, are brought also into Court as co-pursuers, so that the two together at all events could restore the subject-matter to Molleson. Does that give them a title to sue?"

i.e., a formal title. So in *Duke of Atholl* v. *Torrie*,[2] where certain members of the public successfully vindicated a right of way through Glen Tilt, the Lord Chancellor (St. Leonards), at page 71, said the question was "whether the respondents

[1] 1894, A.C. 96. [2] 1852, 1 Macq. 65.

have a right to sue." The Scots books regard this case as deciding "title."[1] The phrase "title to sue" ought to be restricted to the formal legal title—the evidence of right.[2] For example, a legatee has no right to sue a debtor of the testator, but he can obtain this right if he is allowed to make up a title as executor. The title to sue removings is closely connected with the completion of titles in conveyancing.[3] So, as to title to defend, reference may be made to *Keiller* v. *Magistrates of Dundee*.[4] Mr. Keiller had a written title to the foreshore in dispute, but no right; the Magistrates had no written title, but the public had a right to use the shore, and the Magistrates had therefore a sufficient "title to defend." In fact the only proper use of the pleas "no title to sue," "no title to defend," is against a person who may have an interest, but requires to take some formal step to vest himself with the right, and has failed to do so; or where there is an undoubted right somewhere and an undoubted obligation somewhere, but the right to enforce it is really official, and the person appearing has not the proper representative character. Another example which illustrates the phrases "claim," "good case," "right of action," and others, is *Whitehead* v. *Blaik*, 1893, 20 R. 1045, where a married woman sued with consent of her husband for damages arising from the death of her son. It was held that she had no title to sue. Lord Kinnear justifies this, for he points out that the instance might have been remedied. A person who has no right at all can have no real title to sue.[5] Any other use than that indicated implies the treatment of the whole law and all possible legal relations under this plea. The laxity under notice is similar to that already discussed in the "right of action" (p. 52). This use of the word title is in short an example of the absolute confusion of right and title about to be noticed. Sir Walter Scott puts the word

[1] *Cf.* Magistrates of Edinburgh, 11 A.C. at p. 671.
[2] Mackay, *Practice*, i. 279.
[3] Bell, *Prin.* 1267.
[4] 1886, 14 R. 191.
[5] See remarks of Lord Young in Cambuslang West Church *v.* Bryce, 1897, 25 R. 328.

"title" in the mouths of persons from whom we should expect "right," apparently because it sounds better.—(*The Antiquary, passim.*)

(5.) A right may be a title as the foundation of another right, as in the phrases, "A bishop seised in right of his church," "a husband seised in right of his wife."[1] In company law it is much discussed what is meant by a person holding shares "in his own right." The ordinary meaning seems to be that the shareholder should have such a title that the company may safely deal with them as his shares, while, on the other hand, it is maintained that he should not only have the legal title, but also the beneficial ownership, though this may be incumbered.[2]

The phrase "completion of title" (Titles to Land Consolidation (Scotland) Act, 1868, sect. 24; Conveyancing (Scotland) Act, 1874, sect. 4 (1)) implies a title midway between the abstract legal title and the concrete deed which is evidence of the right. The imperfect title may be a written contract of sale, missives, or a formal conveyance; the title is *completed* when all the formal steps have been taken which are demanded by the law for vesting the owner with all active and passive rights and obligations,—title to sue, defend, remove tenants, &c.

In the Crown right and title may properly coincide, because the mere vesting of the right may be held to give a title as well. So we read in Balfour's *Practicks*, p. 23, "Gif ony Bischop deceis, the King hes richt and title to intromit with and uptak the maillis, &c. of all lands, &c." It is on this principle that the Crown vests absolutely by survivance, and no written title is necessary.—(Craig, *Jus Feud.* i. 16, 47.) This is also true of udal tenure in Shetland. Possession and survivance are titles.—(Ersk. *Inst.* iii. 8, 77.)[3]

(6.) In modern usage the tendency is to identify right

[1] Bythewood and Jarman, i. 3.
[2] Bainbridge *v.* Smith, 1889, 41 Ch. D. 462.
[3] "Mortuus sasit vivum," Trayner's *Maxims, s.v.* See p. 88, *infra.*

and title. Thus in *Castrique* v. *Imrie* (L.R. 4 H.L. p. 425) Mr. Justice (afterwards Lord) Blackburn said :—

"The first question which arises is, whether on these facts the plaintiff had any title in the ship. . . . No title in the ship was conveyed," &c. &c.

This case illustrates the use of "claim" (a right which may be contested), "interest" (a limited right); and will be noticed again for "privilege," and as showing how recognition by foreign states may come to be necessary for the existence of rights.

The following passage from Bankton shows how complete the identification of right and title was in his day :—

"In the law of England a distinction is made between the terms *Estate*, *Right*, *Title*, and *Interest* in lands. *Estate* or *State* signifies an inheritance, freehold, term for life or years, tenancy by statute, merchant, &c. which any man has in lands or tenements; a *Right* properly is where one is out of possession of his estate, by disseisin or wrong, and has remedy by entry or action; but *Right* includes also an estate *in esse* in the case of conveyances; thus, if a tenant in fee-simple make a lease for years, and release all his right in the lands to the lessee and his heirs, the whole estate in fee-simple passeth. A *Title* is properly when a man has lawful cause of entry into lands whereof another is seised, for which he can have no action, as title of Mortmain, &c.; but legally (Title) includes (Right) also. *Interest* is regularly taken for a right to a term or chattel real, not yet commenced; but in legal understanding it extends to estates, rights, and titles. The terms *Right* and *Title* are promiscuously used in our law. As to *Estate*, it is generally taken for a man's land estate, but it is frequently applied to moveables, as when we speak of one's personal estate, which comprehends both goods and *nomina*, or debts due to him. *Interest* comprehends every right or title one has to a subject, but sometimes it is taken for a collateral or incidental interest, as a husband's interest in his wife's estate, the common debtor's interest in his effects attached or arrested, the heritor's interest in an action of poinding the ground."—(*Inst.* i. 597.)

The confusion is shown by Tomlin's attempt to distinguish them (*Dict.*, *s.v.*). He says title is more general than right. "Every right is a title, but every title is not such a right for which an action lies."

In the Agricultural Holdings Act, 1883, the rubric of section 1 speaks of the "general right of tenant to compensation," but the section itself says "he shall be entitled" to

obtain compensation. This might be illustrated from almost every statute. "Shall be entitled" is constantly used as equivalent to "shall have a right to."

The confusion of right and title extends to the modern use of the word *jus;* thus *jus relictæ* is treated as a thing, an estate (p. 86); but when the phrase is put *jure relictæ, jure coronæ,* &c., *jus* becomes a "title."[1]

(7.) Austin finds fault with the usage, which treats *title* as if it were synonymous with *right,* and points out that *title* coincides with what Bentham called an investitive fact or event, that is to say, "the fact, simple or complex, through which the party entitled was *invested* with a right." (*Jur.* 1010; Bentham, *Morals and Legn.* 248.)

Duff (*Feudal Conveyancing,* 154, 172) carefully distinguishes a right from a title, by which he means a written title only, thus differing from Austin's use. The title is often a matter of form, and any defect therein may generally be remedied, so that questions of title are resolved into mere matter of expense.

In the phrase "right, title, and interest," "title" stands for the evidence of the right. In the ordinary form of trust-disposition and settlement (Jur. Styles, 5th ed. ii. 575, &c.) the single word is expanded thus—

> "Together with the whole writs, titles, vouchers, and instructions of my said estate, and all that has followed or may be competent to follow thereon."

An interesting political application of this phrase occurs in the works of John Lesley, Bishop of Ross, the Scots ambassador at the Court of Elizabeth. In 1584 he published "a treatise touching the right, title, and interest of the most excellent Princesse Marie, Queene of Scotland, and of the most noble King James, her grace's sonne, to the succession to the croune of England," &c. The Latin edition published in 1580 bore to be "De titulo et jure, &c." In a similar work published by him in 1571 the same phrase occurs.

[1] *Cf.* Conveyancing (Scotland) Act, 1874, sects. 59 and 60; Begg's *Code,* pp. 413, 414.

Perhaps this last example shows the uselessness of attempting nice distinctions. As is proved by the passage just quoted from Bankton, "right, title, and interest" is simply a formula for every right, legal and equitable, if not sentimental, the granter may possess.[1]

(8.) There are several physical applications of the term "title." In the Theodosian Code[2] we find the phrase "Largitionales tituli" for burdens or payments imposed as taxes for the purpose of largesses.

It is often applied to persons. "Titular" is the technical name for the proprietor of teinds or tithes in Scotland, corresponding to "impropriators" in England.[3]

A title of nobility was formerly the evidence of power and authority. The kingly title gives rights—the *jus coronæ*. Blackstone speaks of the "office, dignity, and duty" of a Marquis—the protection of the marches of the kingdom. So Earls and Dukes had rights and duties corresponding to their titles. Masters and doctors were persons who had the right and title to teach—the *Facultas docendi*. As a competent judge might be intellectually incompetent, so a person might have a faculty to teach without a faculty of teaching. The authority may disappear and leave the title—an empty name. So Dean Swift spoke of a place—

> "Where *titles* give no *right* or *power*,
> And peerage is a withered flower."

A title is now an hereditary right—a thing,[4] so that a person may have a title to a title.

A very common use of "titles" is to denote "title-deeds." —(Jur. Styles, 3rd ed. i. 160.) "Evidence of title" would be more accurate (Land Transfer Act, 1897, sect. 16, &c.). (*Cf.* Jur. Styles, iii. 314,—"Creditors . . . should be ordained to exhibit and produce their respective rights, titles, and

[1] Broom's *Legal Maxims* (7th ed.), 371; *cf.* Porteous *v.* Henderson, 1898, 25 R. 563,—old title-deeds are not accessories of land.

[2] i. 10, 2; xi. 7, 18; *cf.* Cod. Just. x. 23.

[3] Bell, *Prin.* 1148; Tomlin, *s.v.* Titular; Sir Walter Scott, *Ivanhoe*, note to chap. xxii.

[4] Blackst. *Comm.* i. 190, 271, 397; *cf.* Buckhurst Peerage, 2 A.C. 1.

diligences." There are numerous examples of this usage in the Titles to Land Consolidation (Scotland) Act, 1868, and relative schedules.)[1]

"Rights" is sometimes used in exactly the same sense,—*e.g.*, "for payment of the blench duty contained in his rights and infeftments of the same" (Dallas, ii. 457). In the other example just quoted "rights" is generic, including "titles," —voluntary deeds, and "diligences,"—judicial decrees, &c.

So one volume of the Juridical Styles is titled "Moveable Rights." If all that you know is your title, the transition to identifying it with right is easy. The scrip is all your *right* in the railway. A paper note is only evidence of your right to £1, but if you lose it your right is gone also. If you can trace it, it will probably be in the hands of a *bona fide* holder.

In later ecclesiastical law title came to mean a district in the city of Rome with a taxable area, and then a parish church in Rome, as distinguished from an Oratory or Basilika. This is a purely physical reference. It was due to the fact that a person had to receive such an appointment before he could be ordained priest.—(Ducange, *s.v.*). So we find in the Decretals of Gregory IX. (iii. 4, 2), "Deponitur Cardinalis qui in suo titulo non residet."—(*Cf.* "Non habens titulum," *Sexti Decretalia*, iii. 4, 37).

Tomlin (*Dict. s.v.*) says that a title of a clergyman is the church to which as priest he is ordained there constantly to reside, for one reason, because in former days the name of the Saint to whom the church is dedicated was engraved on the porch, from whence the church itself was afterwards denominated "Titulus." Another explanation connects this usage with the Roman one of payment or burden.

Dr. Ayliffe in his *Parergon Juris Canonici Anglicani* (p. 403) says a title was required "to hinder persons in orders from becoming beggars, to the great disparagement of the priesthood."

[1] *Cf.* the transfer of "Documents of Title" in the Factors Acts, and "Transfer of Title" in Sale of Goods Act, sect. 21, rubric.

(9.) But it must be borne in mind that the word *title* is used in ecclesiastical law in all senses corresponding to the usages in municipal law. Dr. Ayliffe (*l.c.*) says—

"The word title is in our law-books taken several ways; sometimes it is put for the motive or consideration on which account dominion or property is transferred. Sometimes a title is styled by the name of *Necessity*, and sometimes 'tis called a token or sign of a thing. Sometimes ecclesiastical orders, or any church dignity or pre(h)eminence are called a title, and lastly, a benefice itself is sometimes called a title. . . . The Archdeacon says that a canonical title is a spiritual motive or consideration, on which account a person has a right or power given him of dispensing matters relating to the Church, and such a title is only agreeable to a clergyman. But a title to orders and a title to an ecclesiastical preferment are different things. For a title to an ecclesiastical preferment accrues several ways, as by collation, presentation, nomination, election, and by other ways and means of introducing a title into an ecclesiastical benefice, whereby the person claims institution, confirmation, &c.; but a title to orders only arises from the act of obtaining some ecclesiastical benefice, or having a grant thereof (at least) whereby he may claim ordination. There is also another title which we call *a title to the profits*, and this is a spiritual right accruing to a man from having institution given him to some living."

(10.) In the Latin version of the 131st Novel of Justinian the title is given as "De Ecclesiasticis *titulis*," corresponding to the Greek "*περὶ τῶν ἐκκλησιαστικῶν κανόνων καὶ προνομίων*": but in the preface the Greek words are translated by "regulæ" and "privilegia." The word "titulus" does not occur in the Novel itself, and the title may therefore mean "Of ecclesiastical rights or privileges," &c. may only be a very early example of the confusion of *right* and *title*.

SECT. XIX.—INTEREST.

(1.) We have hitherto regarded right in various forms from the point of view of the claimant and as vested in him, but all rights have some object—some physical embodiment outside of the subject claiming them, and there is a constant tendency to identify the right with the thing claimed, and so if the right is not already a right *to* or *in* a physical external thing, it becomes itself a thing or finds external embodiment in a "title." Even "interest" is no exception. Its first

reference is subjective, although it may now be taken as completely identifying right with its external physical object.

Interest is derived from the Latin *interesse*, and points first to physical presence. If something is in the midst of a crowd it is "interesting." The interest is partly subjective, arising from the character or the position of the observer, and partly from the nature of the thing. This usage is post-classical (Ducange, Littré.). The classical usage will be found in Gaius, iii. 161, where Muirhead translates "quatenus mea interest" by "damages for the loss I have sustained."[1] In later usage *Damna et interesse* means loss and damage. This is the interest of the person wronged (Ducange), and this phrase appears in modern French as *Dommages et intérêts* or *Dommage-intérêts*.—(Littré.)

We may notice in passing the association of ideas of interest as the payment made to a person by another who enjoys the use of a capital sum belonging to the former. The lender is interested in the capital, but the interest is his special aim and "interest," if the borrower is able to pay. Interest in this sense is pactional or legal damages for withholding payment of the principal. The word has legal associations, while "usuræ" had associations of illegality and immorality. Bartolus in his Commentary on the Code (i. 1, 7) says—"Et ideo tenendum est, usuras nullo modo exigi ut usuras, sed ut interesse."

(2.) Every right is necessarily an interest, or a group of interests; but there may be interests—political, social, scientific, sentimental—which are not legal. So in ordinary legal usage an interest may mean (*a*) a subjective feeling, varying from the vaguest sentiment to an "equitable interest," which Courts will protect; (*b*) a limited right, fully recognised and protected by law; (*c*) the sum of such rights—a full absolute right; and (*d*) it may be a right absolutely identified with an object—a thing.

(3.) In the debate in the House of Commons on 13th

[1] See the texts quoted in Puchta, *Cursus* ii. p. 308 (8th ed.).

May 1897 (Hansard, 4th Ser. 49, c. 340) on the Lochearnhead Railway Bill, the word "interest" occurs several times, and the meaning varies from a vague sentiment to a legal right.

"The interests of the public ought to be protected" (345). "He had no interest in the Bill one way or the other" (347). "The proposed route [was] injurious to their interests" (348). "Crofters whose interests were injuriously affected" (349).

When we speak of the interest of a judge, notary, or witness as a bar to his acting, we mean by interest a fact which is an element in negativing his title, power, or right to act. A subjective feeling is not enough: the interest must generally be substantial and objective.—(Green's *Encyclopedia*, *s.v.* Interest; Smith, *L.C.* 10th ed. ii. 310.)

In political affairs, where rights are hard to define, recourse is had to the vaguer idea of "interests." Thus, in the charter of the British South Africa Company (sect. 3) (Hertslet, *Map of Africa*, 176), the Company is authorised to acquire "all or any rights, *interests*, authorities, jurisdictions, and powers of any kind or nature whatever;" and further, "to hold, use, and exercise such territories, lands, property, rights, *interests*, authorities, jurisdictions, and powers."

So in international affairs we read much of British "interests" in the East, in China, and in the world in general. —(Hertslet, *Map of Europe*, 2615 *et seq.*).

(4.) We then find "interest" used in the technical sense of a limited right. So

"Interest is commonly taken for a chattel real, as a lease for years, &c. . . . In legal understanding an interest extends to estates, rights, and titles that a man hath in or out of lands, &c."—(Tomlin, *s.v.*).

It is apparently often used as contrasted with right, *i.e.*, full right.[1] "Rights and interests" occur in combination in *Weller* v. *Ker*, L.R. 1 Sc. App. 11, in Lord Chelmsford's opinion, and are perhaps thus contrasted.

In the Merchant Shipping Act, 1894, section 57, "equitable right" occurs in the rubric, but in the section "beneficial

[1] *Cf.* Definition of *Property* in Lunacy Act, 1890, sect. 341.

interest" is used, which is defined as including "equitable interest." So again:

"Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the *rights and interests* of persons *interested* in his real estate."—(Land Transfer Act, 1897, sect. 2 (4)).

In *Fraser* v. *Lord Lovat* (1898), 25 R. 603, we find an Act of 1774 referred to, which contained the comprehensive clause, "saving to all and every person all such estates, rights, titles, *interests*, claims, and demands of, unto, and out of the lands and premises to be granted aforesaid." This is an amplification of the phrase "right, title, and interest" formerly noticed (p. 78), and really means "rights," whatever shape they may appear to assume.

(5.) The interpretation clause of the Conveyancing (Scotland) Act, 1874, section 3, defines an "estate in land" as including an interest "in fee." This may be in absolute dominion.

We have already noticed the "title to sue" in connection with the "right of action." To found such a right, which of course does not necessarily imply a substantive right behind it, a person must have both a title and an interest to sue.—(Mackay, *Practice*, i. 279). By title is meant the formal legal right, and by interest, some benefit from asserting the right or preventing its infringement. These are both necessary to maintain an action. The interest needs not be pecuniary, but it must be one recognised by the law. Law raises a merely personal subjective interest into a legal objective one. If a person is duly vested with a legal right, he has both a legal title and a legal interest to defend and vindicate it. The interest recognised by law must be an objective material one; it has generally a market value. But the idea of interest is wide, and may cover interests of property as well as more limited rights. Thus in marine and fire insurance interest often does mean property (Green's *Encyclopædia*, *s.v.* Interest).

(6.) An interest, if recognised by law and proved by a

proper title, will thus become a right. The ordinary usage is "to have a right." It may be to a thing, if it is proprietorship, or "in a thing," if it is a more limited interest or estate. Even if this is a mere feeling, it is an object to the mind. The tendency is then to identify the external object which gratifies the subjective feeling of right with the right itself, somewhat in the same way as we confuse "tradere rem" and "tradere possessionem." We naturally speak of giving delivery of a thing and giving a right to it—of having a thing and having a right to it. Possession implies a right to possess. Physical possession is a title.

Right accordingly means a thing, the object claimed. This practically identifies right and interest. Thus, Lord Watson in *Studd* v. *Cook*, 8 A.C. at p. 598, speaks of a disposition "of each or every *right or interest* in land." But section 3 of the Titles to Land Act, 1868, had previously defined "land" as including "heritable subjects, securities, and *rights*."—(See Schedules, *passim*).

In Erskine's *Institute* (ii. 12, 6) we find a reference to a "moveable right or subject." Courtesy, a reversion, a lease, are all given as examples of heritable rights; and the words "faculty," "power," "privilege," "interest" all occur in this section in the same connection as *objects* of legal diligence of creditors. The right is subjective in its conception, but as it always refers to an object, it soon becomes absolutely identified with that object, if it is not the case that it is truly objective in the first instance, and becomes subjective on reflection. So we can speak of the "mortgage of a right."—(*Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 169).

So section 4 of the Bankruptcy Act, 1856 (19 and 20 Vict. c. 79) says that "'property' and 'estate,' when not specially restricted, shall include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and *interests* therein, capable of legal alienation."

To what we have already said as to the meanings of the word *jus*, it should be added here that this word is also in

Scots practice frequently used as "a thing," and may be translated *interest.* Thus the *jus mariti* may be a thing, while the right of administration is always a power. Bell may be quoted :—

"[A husband's] *jus mariti* comprehends every subject which forms part of the common stock. It operates *ipso jure* like an assignation, without the necessity of intimation ; and is available to his creditors, either on the arrestment of particular funds, as interests or rents become due, or by *adjudging the right* so as to make it available against the rents of the wife's estate."—(*Prin.* 1561.)

Jus relictæ is a thing.—(Bell's *Prin.* 1579). "The surviving widow has a third [or, if there are no children, one-half] called *jus relictæ.*" As to *jura crediti,* Bell (*Prin.* 1339) says—

"Frequent occasions arise in which it is necessary thus to contemplate *jura crediti* as property, as in bankruptcy, on marriage, or on the death of the owner."

"Incorporeal rights comprehend all *jura ad res,* the *jus edigendi* in all obligations."—(*Prin.* 1338.)

"The right of patronage may be in a subject as an accessory of his land, or as vested in him by infeftment, &c." "If once vested by infeftment, patronage must ever after, like land, be transferred by sasine."—(*Prin.* 836.)

On the other hand, we must observe that the right of electing ministers to parishes in Scotland under 37 and 38 Vict. c. 82, is a *power* vested in congregations, and failing them, in Presbyteries, under certain regulations.

Interest as a money payment, already alluded to, may perhaps be taken as another physical usage.

SECT. XX.—THE CLASSIFICATION OF RIGHTS.

(1.) The principal working classifications of rights are classifications of interests or objects of right. Hence the distinction of real and personal rights. All rights are *subjectively* personal, because they inhere in a person or persons ; but the distinction refers to rights as objects. This distinction carries us back to the identification of "right" and "right of action."

The distinction between real and personal actions is drawn in Justinian's *Institutes* (iv. 6, 1). The former were intended to declare a right of property, status, or such like, and the latter were founded on obligation—contract or delict—*i.e.*, they were distinguished according to the *object* aimed at.

Erskine says:—

"Actions are divided both by the Roman law and ours into real and personal. A real action or *actio in rem* is that which arises from a right in the thing itself, or a *jus in re*, and is grounded either upon the right of property, which is the highest right that one can have in a subject, or on a right of servitude, hypothec, pledge, &c., which are inferior real rights. A personal action is that which is founded merely in a right of obligation against a person or a *jus ad rem*."—(*Inst.* iv. 1, 10.)

Erskine speaks of grounds of action, but he next proceeds to refer to the ends also. A real action aims at dealing with a particular thing, irrespective of the particular individual who may possess it. A personal action tries to enforce the right through a person.

So Comyn says:—

"An action is denominated real or personal, as the thing sought to be recovered is the one or the other."—(Dig., 5th ed., *s.v.* Action.)

This is an addition of the editor, for the original statement was, that "a personal action is such as concerns the person only, by which nothing but damages can be recovered." The person here is the debtor or defender (defendant), and not the creditor or pursuer (plaintiff).

In later usage the distinction was applied to rights themselves. Bell (*Prin.* 2-3) divides rights into two classes—(1) those which relate to property or things external; and (2) "those which relate to the person, the safety, liberty, and reputation of men." This seems to be a new distinction, but it is open to criticism, *e.g.*, is the right to the custody of a child real or personal? Bell then continues—

"Of the rights relative to property another division has been made by lawyers into those which depend upon the engagement or obligation of the person to give the thing, or to make it available to another in perpetual or temporary use, and those in which, by immediate connec-

tion with the thing itself, without the intervention of another, it is said to belong to the person. Rights of the former kind are sometimes termed personal rights relative to things, being available only by demand against a particular person. Rights of the latter kind are called real rights, and are available against the thing itself in whose hands soever it may be found."

Bell's first division may be regarded as a natural one, depending on whether the object of the right is a person or a thing. The second division is technical, and is merely an application of the distinction of real and personal actions to rights themselves. In Scottish procedure it is useless; for in a *vindicatio rei* the possessor will be called for his interest, and a petition for custody of a child may be personal in form, but it gives a real right.—(See Ersk. *Inst.* iv. 1, 10.)

Blackstone's division of *jura personarum* and *jura rerum* (i. 122) is adversely criticised by Austin as being illogical and ambiguous, since *jura personarum* sometimes means rights vested in persons and *jura rerum* rights over things. If persons and things are the objects over which rights extend the phrases may be defended; but Blackstone's exposition is very loose, and he does not so restrict it.[1]

But even in land there may be real and personal rights.—(Menzies' *Conveyancing*, 628.) This is another technical usage in the law of Scotland. A "personal right" to land vests in an heir without service (Conveyancing (Scotland) Act, 1874, sect. 9). A personal right here merely means a right which has not been made evident by sasine or recording a complete title. It is a true and absolute right to land—a real right in one sense, but not real because unfeudalised, *i.e.*, not formally completed.

J. M. Bell (*Lect.* 760), speaking of such rights under an unfeudalised conveyance, says—"[The disponer] has no real right in himself, and is therefore not in a condition to give a real right to another." If another person got a subsequent disposition from the apparent owner on record, and recorded his disposition first, he would be preferred before the holder of

[1] *Cf.* Christian's note *ad l.*; and Austin, 43, 750, 803.

the unfeudalised conveyance. The right of the second disponee was made real, while the right of the prior one was an action of damages against the fraudulent seller, or an action of reduction against the purchaser, if he knew of the previous sale, or took the conveyance gratuitously. The distinction here is truly between a personal and a real *title*, though it may come to be between a real and a personal *right*, if the second purchaser is in good faith and the seller is bankrupt. The distinction between real and personal titles and rights in this sense is drawn in the public interest. It is to protect third parties, who are entitled to rely on the public registers.

(2.) The distinction of rights, heritable and moveable, depends on the nature of the thing so described as regarded by the law for purposes of conveyance and succession. Historically it arose from the difference of interest which the owner had in the object.[1] It illustrates the absolute confusion of the right and the object over which the right extends. So Joannes Voet makes actions heritable or moveable.—(i. 8, 21.)

(3.) Civil rights may be opposed to criminal,—the right to reparation as opposed to the right to prosecute and punish. These may also be opposed to ecclesiastical rights or to military rights.—(Austin, *Jur.* 780.) Both of these last may be what we have already referred to as "official" rights, the rights involved in the duty of performing certain acts, or administering a military code, and the powers necessarily involved therein. Within the circumference of the ecclesiastical or the military system we may have a complete code of quasi-civil and quasi-criminal rights. The varying interests of parties may bring these rights into collision. For example, a person wronged may find it to his private interest to take pecuniary compensation, while the public interest would regard the transaction as "compounding a felony."—(See p. 116, *infra*).

(4.) It is the distinction of kinds of interest which gives

[1] Holmes, *The Common Law*, 350; Holland, *Jur.* 98.

rise to the ideas of "radical right" (*Smith*, 22 R. 130), "trust right," "boneficial right," "conditional or contingent rights," &c. Rights we have seen are in their first conception the result of action; they are then regarded as the grounds of action, and finally they come to be regarded as legal rights (in a technical sense), though the actual obligation corresponding may be only contingent or conditional. Strictly speaking, there is no right and no obligation till the day of payment comes or the condition is purified; but the same intellectual movement which pushed back right from the result—the final cause—to the precedent cause of an action, pushed it still further back to the result of a relation which may be further developed by events. Conditional or contingent rights are thus only rights in anticipation. We deal with them, value them, sell them, and raise money on them, and so law has come to deal with them in bankruptcy, successions, entails, and other cases. The machinery by which this is effected is the substitution of present rights for the so-called future ones.

The doctrine of vesting subject to defeasance (*Hood* v. *Murray*, 1889, 14 A.C. 124; *Jur. Rev.* x. 188) which has recently attracted some attention from the Courts, is an extreme application of the idea. Rights are then "defeasible or indefeasible," and the machinery of trusts makes this distinction possible. The trustees have legal rights which enable them to provide for the beneficial rights held in suspense, and the remote interests of perhaps unborn issue.

The assignation of a *spes successionis* recognises a still more shadowy species of right. This phrase is applied to a contingent right of succession depending on survivance, as well as to the sanguine expectations of a poor relation who has no legal claim whatever.—(*Jur. Rev.* v. 212.)

The ordinary will presents a similar difficulty. The law now allows a man to convey, as at the present moment, "all that shall belong to him at the time of his death." But the early Roman will and the Scots trust-disposition down

to 1868 caused him to divest himself (at least in words) as to heritage at the date of the deed. Another way was to feign that the will spoke at the date of death.

We may see in this process of realisation or idealisation of interests a natural struggle between two ideas. The person claiming a right tries to make actual, material, real objects of his merest fancies and whims; the person from whom the right is demanded refuses to recognise claims unless they can assume substantial material shape, and having assumed this shape they are reduced to reasonable dimensions by criticism, ridicule, and other circumstances.

(5.) But State action and recognition, to which reference will be made presently, also contribute much to impress a material meaning on the interests which men have in things and in other persons and their conduct, although in the first instance these may appear to be purely subjective. Law can only deal with the external and visible, and if an object is not so, law makes it so in order to make it intelligible or workable. So personal claims, personal interests, and moral rights, when formulated by the claimant and recognised by society, become legal claims, legal interests, and legal rights. Interests may then be classified as "lawful or unlawful."

Man is a social animal; but the law forbids certain associations, and calls them conspiracies. All men have an instinctive interest in amusement, but the law calls some games, like bear-baiting and cock-fighting, unlawful. We may here refer to one aspect of the group of cases to be noticed hereafter (Chap. III.), the principal of which are the *Mogul Steamship Co.*; *Allen* v. *Flood*; and *Quinn* v. *Leathem* (1901, A.C. 495; *Jur. Rev.* x. 106, xiii. 452). FitzGibbon, L.J., who tried this last case, directed the jury to determine "the intent of the defendants, and in particular their intent to injure the plaintiff in his trade, as distinguished from the intent of legitimately advancing their own interests." This charge was expressly approved by the Lord Chancellor, and

the distinction indicated was adopted by Lord Shand (p. 515). You may ruin your neighbour by competition in trade or by refusing to work with him, and persuading others to refuse likewise. It is indecent to gloat over his misfortunes, but if you cause them, it must be by means recognised in law. If your material interests are lawful, malicious motives will not make them unlawful. It may be suggested that if the proximate intent is to promote lawful interests, the law does not regard what it considers the remote motive of ruining all others in the trade, even though the person acting has this as his main, malicious interest. The law treats it as remoter, because the results are subsequent in time. That you injure the interests of a third party does not by itself make an act unlawful. But the true test appears to be how it affects the interests of society or the State. These interests are infinite. Sometimes it may be the sacredness of person, of property, or of contract that the courts mean by *lawful* interests. Sometimes they refer to remoter ethical ends, determined by the ideals of society. The three elements—(*a*) the interest of the actor (defendant); (*b*) the interest of the injured complainer (the plaintiff); and (*c*) the interests of society—order, freedom of trade, &c. are clearly set forth in the opinion of Lord Lindley.[1]

SECT. XXI.—GROUPS OF RIGHTS.

We have already noticed *capacity* and *status*, as well as *potestas*, as indicating a group of rights vested in a person. We may here notice briefly certain terms which indicate an indefinite *group* of rights or interests round a definite object. These are originally concrete relations of fact, and then abstract rights.

(1.) *Dominium* is such a term. The relation of a person to a thing may be conceived as concrete, but *dominium* becomes the abstract right of property—the relation of a

[1] 1901, A.C. pp. 534-537. See further on this subject, pp. 137, 138, *infra*.

dominus to a slave or thing. Livy indeed expressly groups "dominium et jus."

It then again becomes a thing in "domain," and in political application it becomes concrete in "dominions."[1]

(2.) Property refers to the relation of a thing to a person. It is peculiar to him—his own.

Then it is transferred to the thing. It is an interest in a thing, or a group of interests. So English law speaks of a general or a special property or an absolute property.—(Benjamin on *Sales*, 1-2.) "[He] had a property or at least an interest in the goods,"—(8 Q.B.D. 379).

Lastly we advertise "a property for sale," and speak of "heritable properties."[2]

The Bankruptcy Act of 1856 (sect. 4) groups "property" and "estate," and extends their meaning to heritage and moveables,—(see pp. 64, 83, *supra*, and sub-sect. (6) *infra*).

The English Act of 1883 (sect. 168) provides that—

> "'Property' includes money, goods, things in action, land, and every description of property, whether real or personal, ... : Also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined."—(*Cf.* Local Govt. Act, 1888, sect. 100.)

This includes indefinitely rights springing from the thing.

"Property" may be used abstractly for wealth in general. —(*Cf.* Tennyson's *Northern Farmer* (new style); Austin, 817).

We may notice here the identification of property with right in general in the English *Writ of Right* (Blackstone, iii. 195), which was a form of process for the recovery of lands in fee-simple, though it was afterwards employed for the enforcement of inferior rights. It is also described in Skene's *Regiam Majestatem* (i. 10; ii. 16, 20). The form there given identifies right and property by speaking of the lands as "my awin proper richt."

(3.) Possession may also be noticed. It passes through

[1] As to the *dominium eminens*—eminent domain—see Ersk. *Inst.* ii. 1, 2.

[2] *Cf.* Titles to Land Act, 1868, sect. 7, with Conveyancing Act, 1874, sects. 3 and 6.

the phase of (*a*) an actual physical holding: (*b*) then it means the legal holding—the right to hold—presumed from the actual holding: (*c*) then it is the abstract right recognised by law—the *jus possessionis*, as distinguished from the mere *jus possidendi*. In some quarters "possession and right are in theory co-extensive terms" (Holmes' *Common Law*, 238); but Professor Pollock (*Possession*, 2) says that, "whether in the popular or the legal sense [it] does not necessarily concur with title." But to discuss this point would carry us beyond our present purpose. And finally it means the things possessed—"great possessions."

(4.) *Imperium* is an official right, or group of such rights.

It is the abstract right of the general or military commander, and finally, through the title of the Roman emperors, it has become territory in the word "empire," while still retaining its other meanings.[1]

(5.) Royalties and lordships are rights—

> "Thou and thine usurp
> The dominations, *royalties, and rights,*
> Of this oppressed boy."—(Shakespere, *K. John*, ii. 1. 176).

Now "royalties" is applied to rights of a particular kind, *e.g.*, under mining leases. Here they are regarded from the converse side as duties or burdens.

(6.) And, once more, "estate" or "state" is an abstract condition (Latin, *status*). In law it is applied to a group of rights connected with concrete property, carved out of dominion. As Blackstone explains (ii. 103), "an estate in lands, &c. signifies such interest as the tenant hath therein."[2] This usage is said to be borrowed from England in the Scottish Conveyancing Act of 1874, section 3, where an "estate in land" is defined as meaning "any *interest* in land," whether in fee, liferent, &c. But it was long ago recognised in the old phrase "heritable state and sasine."—(Ross, *Lectures*, ii. 185.)

We must contrast with this the idea of an estate as a

[1] Celsus speaks of the Roman people having *imperium* over the shores of the sea (D. xliii. 8, 3).

[2] *Cf.* Stroud, *s.v.* Right.

universitas of rights in succession or bankruptcy. Holmes says "[estate] means the *status* or *persona* in regard to that land formerly sustained by another" (*Com. Law*, 376). The Bankruptcy Act of 1856, section 4, defines "estate" as including all property, "and all rights, powers, and interests therein," &c. The public who possess property have been familiarised through Sir William Harcourt's Finance Act of 1894 (57 and 58 Vict. c. 30, part i.), with the idea of an "estate" as a *universitas* belonging to a person deceased.

Lastly, it may mean a concrete property, or, politically, concrete territory, and in the three "estates" of the realm, Lords Spiritual, Lords Temporal, and Commons, the idea is applied to orders of persons, while "State" is applied to the whole body politic—the greatest of corporations.[1]

SECT. XXII.—PUBLIC AND GENERAL RIGHTS.

Rights may be general, national, public, or international. The word "interest" is more often used in this connection, the persons claiming the right being indefinite in number. The classification may also be regarded as derived from the nature of the object or interest—something incapable of exclusive enjoyment or difficult of appropriation.[2]

Thus in a highway there are "rights of the public."[3] It has been decided that certain persons "locally interested" have a "right to sue." So—

> "[In England] every parishioner has a right to enter the parish church, and has a right to a seat in that parish church."—(*Halliday* v. *Phillips*, 1889, 23 Q.B.D. 57.)

For the purposes of the Military Lands Act, 1900, "public right" means "any right of navigation, anchoring, grounding, fishing, bathing, walking, or recreation." The right is called

[1] *Cf.* p. 72, *supra*. For the development of the meanings of "status," see Pollock and Maitland, i. 390, 504; ii. 11.

[2] Erskine speaks of the "eminent domain" as a "universal right in the public" (*Inst.* ii. 1, 2).

[3] Duke of Atholl *v.* Torrie, 1852, 1 Macq. 65.

public because it may be exercised by any member of the public.

In an agreement between Great Britain and France in 1893, relating to the Gold Coast, it was provided that the inhabitants of certain French villages should continue to enjoy the "right of fishing."—(Hertslet, *Map of Africa*, 591.)

Again, in a despatch from the Colonial Office of 26th July 1897, we read :—

> "British subjects, and Her Majesty's Government for them, have only claimed the right of every subject of a free State to exercise their undoubted right of fishery on the high seas."—(U.S. No. 4, 1897, p. 123.)

These rights are closely connected with the rights of the Crown.—(Bell's *Prin.* 638, &c.).

The rights of the Crown may now be patrimonial and private, or public and official. So Sir Walter Scott uses sarcastically the phrase, "the rights of Scotland and Charles Stewart."—(*Antiquary*, Chap. V.). This distinction is not known to the earlier English law. It is associated with the change of the King's person into a corporation sole, and the idea that he is a trustee for the State.—(Pollock and Maitland, i. 502.)[1]

SECT. XXIII.—LIBERTY.

(1.) Liberty is the condition of a freeman. It implies negatively freedom from restraint, and comes to mean positively a right or power to act. "Quid est enim," says Cicero, "libertas? Potestas vivendi ut velis." So Justinian (*Inst.* i. 3, 1) defines it as "Naturalis *facultas* ejus quod cuique facere libet, nisi si quid aut vi aut jure prohibetur."—(Quoted from Florentine, L. 4 pr. D. *de statu hom.* (i. 5).)

Liberty is defined by Stair (*Inst.* i. 2, 1) as—

> "That natural *power* which man hath of his own person, whence a free man is said to be *suæ potestatis*, in his own power; and it is defined in the law to be a natural *faculty* to do that which every man pleaseth,

[1] In the case of Gammell *v.* H.M. Commissioners of Woods and Forests, 1859, 3 Macq. 419, the right of the Crown to salmon fishings on the sea-coast was affirmed. The words "sovereignty," "jurisdiction," "*patrimonium*," &c. are used in the discussion (pp. 425, 463).

unless he be hindered by law or force." "It is the most native and delightful *right* of man."—(*Cf.* Blackstone, i. 125.)

(2.) But a later usage treats "libertas" as a general right —*i.e.*, looked at as a power of acting free from external constraint. Examples will be found in the Charters of the Abbey of Cluny, published by the French Government. In one case we find a conveyance of a slave, "cum infantibus suis, *cum omni libertate*,"—*i.e.*, with all the right of a master over her: in other cases it applies to conveyances of lands "cum omni integritate et omni *libertate*."—(Vol. ii. 55, 250, 295, 332.) This does not mean with all "*my* right, title, and interest," but "with all the right of a *purchaser or donee*." We must connect this phrase with the "libera potestas" or "libera facultas," which occur elsewhere in the same volume (pp. 10, 93, 150). These deeds are nearly all dated in the latter half of the eleventh century.

Ducange (*s.v.*) quotes a charter of 1160 in which "mea libertate" means "with my consent"—*i.e.*, of the granter. The liberty is regarded as proceeding from a person instead of being vested in the grantee.

(3.) Liberty is often used interchangeably with "power" —*e.g.*, in the House Tax Act, 1803 (43 Geo. III. c. 161, sect. 60), "full power" is given to assessors to view and examine houses; and "they shall have *liberty* to pass through any house," and "they shall also have *liberty* to make like view and examination . . . twice in the year."

In the Juridical Styles (5th ed. i. 606) we find forms of leases where "full power," "power," and "liberty" are synonymous. We also find, "The second parties shall be entitled and have full right and liberty."—(*Cf.* MacSwinney on *Mines*, 2nd ed. p. 229.) The use of "liberty" in connection with mining grants has tended to confusion with "licence."—(*Cf.* MacSwinney, 268.) If a liberty is exclusive, it is a right, and should be so described; though, of course, "right" might be as ambiguous. Reference may also be made to *Duke of Hamilton* v. *Graham*, L.R. 2 Sc. App. 166,

where "liberty" in the original conveyance is spoken of by the Lords as "a right," "a power," "an authority."—(*Cf.* Ross Stewart on *Mines*, 84.) In *Duke of Hamilton* v. *Dunlop*, 10 App. Ca. 813, the words used are "liberty," "right," "privilege." Here it was held that a reserved "liberty of working coal" was a "reserved estate."

"Liberty" is used in private deeds where the discretion of the person exercising the right is to be used, *e.g.*, in a marriage-contract this clause occurred—

> "Full power and liberty . . . to test upon and divide and apportion . . . my whole means and estate."—(*Campbell*, 1887, 15 R. 103.)

In a bill of lading the words may occur "with liberty to call" at certain ports. This gives a "right"—"a power of deviation," or "entitles" the master to call.—(*Leduc* v. *Ward*, 1888, 20 Q.B.D. 475.)

(4.) Liberty is more commonly associated with public and official rights, or the political rights to be noticed in the next section. It is a right belonging to a community or a person, implying negatively freedom on their or his part from a higher or other power, and also positively power or jurisdiction over certain other persons. Liberties and franchises are treated by Blackstone as incorporeal hereditaments.—(ii. 37).

> "Franchise and liberty are used as synonymous terms, and their definition is a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject."

Examples given are—

> "To hold a court leet: to have a manor or lordship, or at least to have a lordship paramount: to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas and trying causes: to have the cognizance of pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick or liberty exempt from the sheriff of the county," and so forth.

In the passage from Spelman, quoted below, *libertas* refers to this jurisdiction as well as to the area over which it is exercised. Balfour in his *Practicks* (p. 39) speaks of—

"Baronis havand *power* of pit and gallows." "Baronis quha hes *privilege and libertie* of infang thift and outfang thift, quha thairfoir hes *power* to sit and give dome in their courts, &c. within their baronie boundis or libertie." "Baronis havand the power of outfang thift hes gude richt and power to judge all thievis."

In the case of the *Mayor of Penryn*, 1878 (3 Ex. D. 292), an example of a market will be found. It was there laid down that such a grant, with the addition of the words "with all *liberties* and free customs to such a market belonging," does not imply a right to the grantee to prevent persons selling marketable articles on market days within the limits of the franchise, but such a right may be gained by immemorial enjoyment or prescription. It was said the plaintiffs "had a title to such a market."

So of ecclesiastical jurisdiction Balfour (*Practicks*, p. 24) speaks of—

"The hailie kirk of this realme of Scotland, with all richtis and *liberteis* pertening thairto."

These liberties imply that it is free from the State, however tyrannical it may be to its own members.

(5.) We now come to distinctly physical usages.

In the Roman law *libertas*, the status of freedom, came near to being treated as a thing. "Libertas," says Paul, "inæstimabilis res est."—(L. 106, D. *de R. J.* (50, 17)). The title "On Legacies" (*Inst.* ii. 20, 25) speaks of a bequest of *libertas*, and many other examples might be given.—(*Cf.* L. 5, D. *de Fideicommissariis libertatibus* (40, 5), &c.) So in early English law liberty was an incorporeal thing, of which there was possession or seisin.—(Pollock and Maitland, ii. 145). It was also in mediæval times used for—

(*a*) A charter of freedom or manumission.—(Ducange.)

(*b*) A prestation given for protection.—(*Ib.*)

(*c*) The jurisdiction, or area over which jurisdiction extends, as in the following passage from Spelman:—

"Utfangthefe vero dicitur latro extraneus veniens aliunde de terra aliena, et qui captus fuit in terra ipsius, qui tales habet *libertates*. Sed

non sequitur quod ille posset hominem suum proprium, captum extra *libertatem* suam reducere usque infra *libertatem* suam, et ibi eum judicare ex tali *libertate;* debet enim quis juri subjacere ubi delinquit. Proprios enim latrones et alienos infra *libertatem* suam captos judicare possunt." —(Glossary, ed. 1687, p. 314; Thorpe, Glossary, *s.v.*)

SECT. XXIV.—POLITICAL RIGHTS.

(1.) However the association arises, civil rights suggest political. It may be, as Mr. Spencer says, because the latter support the former.—(*Justice*, p. 176). These rights are either liberties and immunities from acts of others or *powers* to act. In mediæval usage the phrases "Libertas ecclesiastica vel canonica," "Libertas Romana" indicate freedom from other jurisdictions—citizenship.—(Ducange, *s.v.*).

Famous examples of this are the Petition of Right and the Bill of Rights at the Revolution. In the former the petitioners pray for—

> "Their rights and liberties according to the laws and statutes of this realm."

The violation of these rights involved also the violation of ordinary private civil rights. Freedom, liberty, and franchise are here treated as rights to exemption from arbitrary taxation and martial law. The Petition quotes the Great Charter that no freeman "be disseised of his freehold or liberties." In the Bill of Rights the phrase "rights and liberties" occurs several times, including, no doubt, the technical meaning of "liberty" already noticed. The latter Act contains several clauses dealing with the succession, but it avoids speaking of the "rights" of the King. It refers to "power of dispensing with laws," "regal power," "titles to the Crown," "power, authority, jurisdiction." It was enacted—

> "That all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom."—(Sect. 6).

The phrase "political and other rights, &c.," is applied by the Naturalization Act, 1870 (sect. 7), to rights of citizenship.

(2.) The term "civil rights" is applied in American law to the rights secured under the 13th and 14th Amendments to the Constitution.[1] These rights are generally the same as those referred to in the English Bill of Rights.—(*Cf.* Bouvier, *Dict. s.v.*: Story on *The Constitution*, 4th ed. ii. 646.) The phraseology used shows that a right of person, or to liberty, or of worship implies that these objects are external things or acts possible through the body, just as we saw in last section "liberty" is turned round from being an object—a status vested in the person—and becomes "a right" itself with other things and acts as objects.

Article 5 of the Treaty of Berlin of 1878 combines the phrases:—

> "The following points shall form the basis of the *public law* of Bulgaria:—The difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of *civil and political rights*," &c.—(Hertslet, *Map of Europe*, 2769; see also 2785, &c.)

—*i.e.*, what would be popularly described as liberties.

So a general right in the inhabitants of a territory with a quasi-political complexion is called "a liberty." In the Treaty of Washington, 1871 (Arts. 18, 19, 20), the phrase "liberty . . . of taking . . . fish . . . with permission to land upon the said coasts" is used indifferently with "right of fishing." Again, certain fisheries *in concreto* are reserved.

(3.) Like the words "Law," "Right," &c., the word "Liberty" has assumed a wide generalised meaning. Liberty has been spoken of as if it were the opposite of government.—(Seeley's *Political Science*, pp. 101, 125, &c.) But this seems to be an exaggeration. To a person struggling for freedom, liberty is the negation of the actual government which here and now oppresses him. But the abolition of this government necessarily implies the setting up of a positive government of his own if the society is to endure. Even brigands must have rule. There is law even

[1] This may be as opposed to "criminal" rights; see p. 89, *supra*.

in hell, as a high authority suggests. So negative liberty always becomes positive. If, then, liberty is a positive right, the rights claimed by rulers and by their subjects come into collision, and the problem comes to be how to harmonise those rights in an organic whole. The rights claimed by Louis XIV. may have been necessary to consolidate the French State; but when this aim had been achieved, *summum jus* became *summa injuria*, and his subjects asserted their rights in the Revolution. Liberty of a people, as in the Constitution of the United States of America, must be very different from the *libertas* of a single individual in the legal sense. It is an abstract figurative expression, and may amount to little more than the absence of apparent foreign domination.

(4.) It may be sufficient to point out here that "freedom" is used in much the same senses as "liberty," as when we speak of obtaining the "freedom of a city or corporation"—right of trading, &c.—"the freedoms and privileges of burghs."—(Stair, ii. 3, 2.) So again Stair speaks of "common *freedoms* of every nation to fish in the sea" (ii. 3, 69).

"Franchise" has also been incidentally illustrated in some of the examples already quoted. It is specially applied to the right of voting for Members of Parliament.—(*Ashby* v. *White*, 1 Sm. L.C., 10th ed. at p. 257.)

(5.) The political rights of the Crown are described by such words as "Prerogative" (p. 117) or "Sovereignty."[1]

SECT. XXV.—LICENCE.

(1.) Licence, to which reference has been made above, may be noted here, though it originally regards the relation from the side of law—*licet*—it is lawful.

"Ilk maister may give libertie to his bondmen, swa that he doe the samin with the King's licence."—(*Reg. Maj.* ii. 14.)

(2.) *Licentia* is defined as a *facultas*, e.g., *docendi*, in the

[1] See Bryce's *Studies in Hist. and Jur.* ii. 49, where the principal authorities are referred to.

case of a graduate of a university. This still survives in the title of the clerical licentiate in this country and in the usage of Continental universities.

(3.) To have a licence is to have a right, as in the case of working mines and minerals (MacSwinney on *Mines*) or in the common case of following certain trades.—(Highmore's *Excise Laws*, ii.)

(4.) A licence is the document evidencing such a right.—(Stamp Act, 1891, &c.).

(5.) Strange to say this legal term has been turned into its very opposite as an abuse of liberty. Perhaps this throws light on the use of liberties by kings and rulers as well as by their subjects.

SECT. XXVI.—PRIVILEGE.

"Licence" suggests a class of words which explicitly involve the interference of society or the State by the recognition or creation of rights, in a form prior to action at law. This may be by legislation or by the conferring of a special title.

(1.) *Privilegium* is originally a law enacted against or in favour of a single individual. So Festus explains the word "privus." Cicero says (*de Leg.* iii. 19, 44) that such laws were abolished by the Twelve Tables.

(2.) In the later law it was applied to rights conferred by law on special classes of persons, *e.g.*, the right conferred on soldiers of making a testament without the usual formalities. —(*Inst.* ii. 11). In the Code of Justinian the rights of clergy are spoken of as *privilegia* (*cf.* C. i. 2, 10, and 12, &c.). In C. vii. 73, *jus fisci* and *privilegium fisci* are used indifferently, and in the following title *privilegium dotis* is used.

A *privilegium* was a true legal right belonging to a class of persons, soldiers, clergy, married women, and others, on grounds of public utility. The phrase *jus singulare* used by Paul (L. 16, D. *de leg, &c.* (1, 3)) expressed the same idea. *Jus singulare* may also be regarded as a branch of the law

giving peculiar rights or remedies, and not merely a group of rights arising in particular circumstances recognised by the general law (*jus commune*). The distinction was technical and hard to maintain.[1]

(3.) In the Canon law, closely following the Roman usage, privilege means a special law, but is used generally as meaning a right.

So Isidore of Seville (Decret. i. 3, 3) says—

"Privilegia sunt leges privatorum quasi privatæ leges. Nam privilegium inde dictum est, quod in privato feratur."

In relation to the laity the rights of the clergy are privileges in the sense used in the collections of Justinian:—

"Every step or degree in order carries with it its own privileges, and also entails its own duties in the Church. These privileges and duties are partly temporal, partly spiritual." "Formerly the temporal privileges of order were large, and extended both to the persons and property of the clergy."—(Reichel, *Canon Law*, i. 252).

In a note the author refers to an authority who enumerated fourteen privileges as enjoyed by the clergy in A.D. 1429. In a later passage (ii. 30) Mr. Reichel defines a privilege as

"A private law conferring some special advantage on a particular place or body of men *within the Church*, at variance with the generally received law, which either exists by custom or by some special grant."

This privilege is an exception to the ordinary canon law, and is analogous to a faculty, a licence, or a dispensation—a legitimation or justice—a grace or favour. The custom of granting such exceptional rights may give rise to an actual right to demand exceptional treatment. Justice will abolish or explain away the exceptional character.—(*Ib.* p. 31.)

The tendency of *privilegium* to become a common right may be illustrated by the rule of Pope Boniface VIII., given in *Sexti Decretalia*, v. 12, 7—"Privilegium personale personam sequitur, et exstinguitur cum persona," which appears in our law in the very dubious form—"Actio personalis moritur

[1] See Savigny, *System*, i. 61 *et seq.*; Lindley, *Jurisprudence*, 27, 80, xxii.

cum persona" (*Jur. Rev.* v. 375). Privilege is regarded here as a right and therefore a right of action.

Privilegium is a common term in ecclesiastical conveyancing. So the rights conferred on the University of Glasgow by the Bull of Pope Nicholas, already quoted, are described by the words, "Omnibus et singulis *privilegiis* libertatibus honoribus exempcionibus immunitatibus . . . utantur" (*Munimenta Alm. Univ. Glasg.* i. 4. *Cf. Sexti Decretalia*, v. 7, 2. University of Wales Act, 1902.)

Even by the beginning of the thirteenth century a new physical meaning has been attached to the word. "Privilegium" means the deed granting privileges. "Si Papa in aliquo privilegio vel scriptura, &c."—(*Sexti Decretalia*, v. 7, 10, *de privilegiis.*) This chapter deals with the forms of "privileges," and illustrates the use of *jus commune*—(the civil law, or the canon law, or both)—with the ideas of liberty and prerogative.

In more modern times the charter of the East India Company was described as a "privilege."—(*Calendar of State Papers*, Colonial, 1513-1616, No. 281.) This is a continuation of the canonical usage.

(4.) "Privilege" is loosely used as signifying the rights of a class of persons, or of a corporation (Austin, 535; Blackst. *Com.* i. 272). This usage has found its way into English law from ecclesiastical sources along with the Italian theory of the Corporation (Gierke and Maitland, *Political Theories of the Middle Age*, p. xiv.) So the charter of Charles II. to the East India Company gives them power to possess "lands, rents, *privileges*, liberties, jurisdictions, franchises, and hereditaments." These are treated as things, and so we have almost a reduplication of abstract rights in concrete interests.

Numerous examples might be quoted from Balfour's *Practicks* of the use of "privilege," with "power," "liberty," &c. (see pp. 25, 39, 40-47, &c.).

(5.) Privilege comes nearly to be used as meaning "an

official right." In Dallas' Styles (I. Pt. ii. p. 46) we find a style of a "Tack of the Assize Herrings of the West Seas of Scotland, in favours of J. S., Sheriff of Bute . . . with the *privilege* of holding Courts of Justiciary, and several other liberties." In this deed the jurisdiction is treated as a thing, like a lease of tolls.

The word is applied to the powers of constables in the Burgh Police (Scotland) Act, 1892. Section 96 provides that special constables "shall have the same *powers and privileges* as constables of police appointed and acting under this Act." This refers no doubt to the immunity of officials (p. 107).

(6.) This term is also applied to political rights. The rights of citizens are spoken of as privileges. This implies a comparison with foreigners, and those who are merely residenters. In the correspondence as to the Bloemfontein Conference (July 1899) we find (p. 8)—

> "A citizen he may be . . . in respect of his *obligations*. But in respect of his *privileges*, he is but half, and less than half, a citizen." "All the *rights* as well as all the *obligations* of the old burghers" (p. 10).
>
> So "persons who shall be capable of all the *privileges*, whilst they are liable to none of the *obligations* of citizens" (Naturalization Commission Rep. 1869, p. xv).

(7.) In wills we find the word applied to private rights, and powers of trustees. Perhaps it has filtered into these from ecclesiastical sources. Thus, in the form of a trust-disposition and settlement (Jur. Styles, 5th ed. ii. 583) the testator is made to confer upon his trustees certain "powers, *privileges*, and immunities," and the same words are used in section 2 of the Executors (Scotland) Act, 1900. These powers may be regarded either as ordinary private rights or as a species of official rights.—(*Cf.* M'Laren, *Wills and Succession* (1st ed.) ii. 589).

(8.) It is also loosely used as applying to the group of rights attached to property, *e.g.*—

> "An absolute estate, to which all the privileges and all the incidents of the ownership of an estate belong" (Lord Westbury in *D. of Hamilton* v. *Graham*, L.R. 2 Sc. App. 179).

In old titles we read the phrase—

"With parts, pendicles, *privileges*, and pertinents" (*cf.* Dallas, ii. 391, 404), "with liberties, *privileges*, &c." (*ib.* 446, 488).

We are told in Tomlin's *Dictionary* (*s.v.* Recovery)—

"The power of suffering a common recovery was *a privilege* inseparably incident to an estate tail."

So Bell (*Com.* i. 149) speaks of "the privilege" and "the privileges of a British ship," and of "British privileged ships." This is the old personification of the ship in a new form.

(9.) The modern usage in the law of Scotland is closely connected with the later Roman usage and the clerical usage of privileges, which we have seen to be defined as laws or rights of a special class of persons.

Privileged writings belong to commerce. Merchants, as a class, have the privilege or right of making valid contracts in forms which would be invalid if used by other members of the community.—(Bell, *Prin.* 21.) This statement has been put in another way. "Privilege" has been applied to a special body of law, as when the law merchant is described as "a privilege or special law, differing from the common law."—(Quoted in Report of International Law Association, Nineteenth Conference, p. 42.)

Persons in certain positions—judges, public officials, masters, and others acting in the public interest—as Paul says, in the text last quoted, "propter aliquam utilitatem"—are said to be privileged when ordinary citizens in similar circumstances would be held liable for slander or libel. Such persons have this privilege—a particular right—not to slander, but to act without fear of consequences to others.—(Bell, *ib.* 2045, &c.)

The privilege of Members of Parliament involves freedom from arrest for debt; the privilege of ambassadors, immunity from the local jurisdiction—negative rights.

(10.) A privilege being a right, it is specially applied to rights in competition. Paul's words may connect this usage

with the others already noticed—"Privilegium fisci est inter omnes creditores primum locum tenere." (*Sent.* v. 12, 10).

"Privilege" is defined in Article 2095 of the French Code as a right which the quality of the debt gives to a creditor of being preferred to other creditors, even hypothec-holders.[1] It sometimes comes near to being objectified as a thing (*cf.* Bell, *Com.* ii. 99), where the seaman's lien for wages is spoken of as "more properly a privilege on the price of the ship when sold." This usage is referred to in the following passage:—

> "It does appear to me that the word 'privilege' as used here is used much more in the sense in which it is used by Lord Tenterden in his work upon shipping, of a charge upon a vessel which the person is entitled to realise by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, B. is to stand in a favoured position."—(*Castrique*, L.R. 4 H.L. 444.)

In like manner, in the law of Scotland a debt is said to be privileged when the creditor has a privilege or particular right of preference over other creditors. Such are the medical attendant in a last sickness, the Crown for taxes, landlords for rents, servants for wages in a bankruptcy.—(Bell, *Prin.* 1402.)

(11.) "Privilege" is often used for "Right" in general.—(Austin, 535; Bell, *Com.* i. 97-99.)

SECT. XXVII.—*BENEFICIUM*, BENEFIT, ETC.

(1.) Benefit is closely analogous to privilege.

Etymologically *beneficium* is a good deed, a favour, done by one person to another; but the word benefactor is used only in an ethical sense, with a tendency sometimes to restrict it to persons who give money—preferably in large sums. It is a title which gives a right to the donee, and the whole subsequent history of the word regards the idea from this standpoint, except perhaps where the conferring of a gratuitous benefit confers a title to revoke for ingratitude. Justinian speaks of the donees as those "in quos *beneficium* collatum est."—(*Inst.* ii. 7, 2; *cf.* Stair, i. 8, 2.)

[1] See Italian *Cod. Civ.* iii. 23, 1.

Seneca has left a work entitled *De Beneficiis*, in seven books, in which he discusses the moral aspects of the subject. A benefit does not consist in what is done or given, but in the intention of the donor—"Itaque non quid fiat aut quid detur, refert, sed qua mente, quia beneficium non in eo quod fit aut datur consistit sed in ipso dantis aut facientis animo." The poor man with his humble offering honours the gods; while the wicked do not escape the judgment of impiety though they deluge their altars with the blood of victims.—(i. 6.) The idea of a *beneficium* here presented from the standpoint of the doer may be compared with that of *justitia*, discussed hereafter.

(2.) In the Roman law particular classes of rights or privileges were known as *beneficia—e.g., B. competentiæ; B. ordinis; B. divisionis;* and this last is still recognised in Scots law.—(Bell, *Prin.* 252, 268.) Ulpian speaks of citizenship as a *beneficium* (L. 1, § 2, D. *ad mun. et de incolis* (50, 1)), just as the Naturalization Act, 1870, speaks of "any right or privilege as a British subject."—(Sect. 2 (2); Blackst. *Com.* i. 272.) Papinian speaks of the *anulorum aureorum beneficium* in the title *De jure aur. an.* (40, 10), while Javolenus (D. i. 4, 3) speaks of an act of Imperial legislation as "beneficium Imperatoris, quod a divina scilicet ejus indulgentia proficiscitur."

(3.) "The benefit of clergy" is popularly used for the *privilegium clericale*—(Blackst. *Com.* iv. 365)—what Browning calls "the clerkly privilege." But this doctrine is older than the Canon law. Modestine (L. 18, D. *de proc. et def.* (3, 3)) speaks of "religionis beneficium." The same idea runs all through the laws of Manu; but in China, though there are privileged classes, such as the Literati, priests seem to be punished with exemplary severity. — (Alabaster, *Chinese Criminal Law*, 108, 533.)

(4.) The word was early used in the feudal law for estates given out for the life of the grantee. — (*Lib. Feud.* i. 1, 5, and 6; Craig, *Jus Feud.* i. 4, 7; Pollock and Maitland, i. 44.) The authority of Seneca is appealed to.—(*Lib. Feud.* ii. 23, 1.)

(5.) The word was also used in its ordinary meaning in the Canon law, as in the phrase "Beneficium restitutionis in integrum."—(Decretals of Gregory IX. i. 41, 10.) The feudal usage just noted was also borrowed, and survived in ecclesiastical conveyancing, as we see from the "Gift of the tack of the teinds of the parish of Colmonel, &c. to the Rector and Principal of the University of Glasgow," &c., dated 11th May 1685, as given by Dallas (I. pt. ii. 47). The words are "together with all right, title, and *benefit* whatsoever, which his Majesty had," &c. The word "benefit" marks an ecclesiastical estate.

From this use the estate of a cleric, the cure of souls, came to be and still is called "a benefice." Right and its object are here identified.—(Decretals of Gregory IX. iii. 12; Sexti Decretal, iii. 9, 2.) The benefice is a *beneficium ecclesiasticum* to distinguish it from ordinary legal ones.

In England a benefice is an estate which may be attached by creditors (Bell's *Com.* i. 123). Ministers in Scotland may have rights and interests therein and titles thereto (Stair, ii. 8, 26).

(6.) We still use the word "beneficiary" for the person who has right--beneficial interest—under a trust, no doubt because the law of trusts came to us through the Church.

SECT. XXVIII.—OFFICIAL RIGHTS, POWERS, AUTHORITY.

(1.) Rights may be official, *i.e.*, arising from or connected with an office or certain duties:—

"The right of the bailiffs . . . is to exercise the *powers and authorities* of constables . . . Now a constable is *entitled* to arrest . . . he *may* arrest on the direct information of eye-witnesses. Having arrested him, I make no doubt that the constable *could* search him."—(p. Robertson, L.J.G., in *Jackson* v. *Stevenson*, 1897, 24 R. Just. at p. 40.)

"There would be no objection to the *right of entry* being given to a police officer."—(Report of Commission on Sale of Intoxicating Liquors, p. 4, Clubs.)

"A lapse is a devolution of the *right of presenting* from the patron to the bishop, from the bishop to the archbishop, from the archbishop to the king."—(Bankton, ii. 86.)

It was the official right to punish or to exact a fine to which Erskine refers when he speaks of "the right which accrues to our sovereigns on the commission of crimes."—(*Inst.* iv. 4, 109; *cf.* Prerogative, p. 117, *infra.*)

(2.) A court is thus said to have a right to decide a case, *i.e.*. power, jurisdiction—*e.g.*, *N. E. Railway* v. *N. B. Railway*, (1897), 25 R. 346—"the power of the Commissioners." In *Maule*, 1825, 1 W. & S. 282, Lord Eldon denied that the Court had "a jurisdiction . . . to oblige the parent to inform the Court of Session . . . what property he has, &c.," and in the same sentence spoke of them claiming "a right somehow or other to determine what is his free income."

In *Shaw* v. *Gould* (L.R. 3 H.L. 55), Lord Westbury said:—

> "The whole reasoning of the Judges in the Scotch cases is founded upon the *right* of the Scotch Courts to redress any wrong committed by either of the spouses, if the act be done within the territory of Scotland." —(P. 88.) "Right or authority of any court."—(P. 76.)

"Power" or "jurisdiction" is more commonly used.

(3.) A Legislature has a right to make laws. Thus—

> "The *right to legislate* over the Bays of Newfoundland, to which that Act applied, of which Conception Bay is one, had been conferred on the Legislature of Newfoundland."—(p. Lord Blackburn, *Direct U. S. Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. C. 422.)
>
> "Plenary powers of legislation."—(*The Queen* v. *Burah*, 1878, 3 App. C. 889, 904.)
>
> "The Legislature is *entitled* to do much: it has almost unlimited *powers*. It has even the *power* to do what is wrong, and we are bound to obey it."—(p. Lord Neaves, *M'Laren* v. *Menzies*, 1876, 3 R. 1159.)

The British Settlements Act, 1887, speaks in section 3 of the Queen in Council exercising "powers," which Sir William Anson paraphrases by "the right to legislate."—(*Law and Custom of the Constn.* ii. 268.)

In the case of *The Mayor, &c. of Canterbury* v. *Wyburn*, 1895, A.C. 89, at p. 93, Lord Hobhouse uses even "competency" in this sense.—(See p. 55, *supra*, and p. 113, *infra.*)

SECT. XXIX.—JURISDICTION.

(1.) The official right primarily associated with the office of Judge is jurisdiction. The Latin word assumed all the various meanings in modern use.

(*a.*) *Jurisdictio* originally is simply *juris dictio*,—the pronouncing of a legal judgment: *Prætor . . . qui Romæ jus dicit* (Cic. *Fam.* 13, 14). *Jus inter cives dicito* (*Lex Plœtoria*, Bruns, 43).

(*b.*) The administration of justice generally: *Jurisdictionem confeceram* (Cic. *Fam.* 2, 13, 3).

(*c.*) Legal authority, — jurisdiction, power: *Jurisdictio prætorum* (Gaius i. 6).

(*d.*) General authority,—control in a popular sense.

(*e.*) A place where justice is administered,—an assize town: *Mediterraneæ jurisdictiones* (Pliny, *Nat. Hist.* v. 29).

(2.) In our law jurisdiction is defined as the "*power* a Court possesses of trying a cause and pronouncing therein valid and enforceable decrees" (Mackay, i. 165). In *Smith* v. *Lord Advocate*, 1899, 1 F. 741, "No jurisdiction," and "no power" are used by the Judges indifferently. Dicey defines it as "the right or authority of a Court" (*Conflict of Laws*, 207).

Jurisdiction is regarded from two points of view—(*a*) as a power extending over the persons or things, subject to the Judge's authority; and (*b*) as excluding certain other Courts, or, if absolutely exclusive, all other Courts. It is a right from both points of view.

In the *Imperial Japanese Government* v. *P. and O. Company*, 1895, A.C. 644, several expressions occur which connect "jurisdiction" with "right" in a Court, and make jurisdiction the object of a right.

"There was a clear recognition of the *right* of the Consular Court *to exercise jurisdiction* in Japan, not only in the case of offences committed by Americans against Japanese, but in the case of civil claims which Japanese might have against American citizens. It cannot be doubted that the intention was that the jurisdiction thus conferred should be

exclusive, and that American citizens should enjoy immunity from being sued as well as from being prosecuted in the local Courts of Japan."—(P. 653.)

In the Foreign Jurisdiction Act, 1890, "the expression 'jurisdiction' includes power." This may be regarded as an aspect of sovereignty.—(*Cf.* Hertslet, *China Treaties*, pp. 434 and 436; Dicey, *Conflict of Laws*, p. 38; *Lib. Feud.* ii. 54.)

(3.) "Jurisdiction" is applied to political supremacy, as in the Articles of Confederation of the United States of America in 1781, which combine "power, jurisdiction, and right."[1]

It may be doubted whether the term "jurisdiction" applied to the powers of the Secretary of State by the Naturalization Act, 1870, sect. 8, is political or quasi-judicial.

(4.) In such statutes as the Army Act, the British Settlements Act, 1887, the Appellate Jurisdiction Act, 1876, and in Acts of Parliament reforming its own constitution, we see persons or bodies of persons created by the law and at the same time representing the law to all individuals who are subject to it. These statutes confer official rights or jurisdictions, and in virtue of office the persons are liable to duties.

(5.) In international affairs it is loosely used with a political reference. The Treaty of Washington, 1892, uses the phrase "jurisdictional rights," and Article 6 refers to "exclusive jurisdiction" in Behring Sea; "exclusive rights in the seal fisheries," "claims of jurisdiction," "rights in the Behring Sea," "rights of Russia as to jurisdiction," "right of protection or property in the fur seals."

(6.) In the Universities (Scotland) Act, 1889, sect. 14 (2), the word is applied in a still vaguer sense in the combination—

"Powers duties, jurisdictions, and privileges of chancellors, rectors, assessors, principals, professors, university lecturers, assistants, recognised teachers, or examiners," &c.

[1] Bryce, *American Commonwealth*, 3rd ed. i. 690. *Cf.* the usage in treatises on International Law and Hearn's *Legal Rights and Duties*, p. 18.

And these words are quoted in the preamble of Ordinance 9 of the Commissioners and applied to the General Councils, which are not courts and have no powers of governing.

Gibbon (*Hist.* Bury's ed. i. 40) speaks of the power of life and death of a master over slaves as a "jurisdiction." This makes it almost a private right.

(7.) In the following passage from the judgment of Lord Westbury in *Enohin* v. *Wylie* (10 H.L.C. 1), dealing with jurisdiction, we see the right or power of a Court looked at from the other side of the relation as a *duty*—

"It is the *right and duty* of [the] judge [of the domicil] to constitute the personal representative of the deceased. . . . To determine who are the next of kin . . . is *the prerogative* of the judge of the domicil." . . . "The Court of Chancery has no more right than the Court of Probate *to exercise the jurisdiction*," &c.—(Pp. 13 and 14.)

Jurisdiction here is the object of a still more abstract right.

(8.) "Jurisdiction" may be regarded as property—an actual thing.—(Pollock and Maitland, i. 512.) Ross (*Lect.* ii. 37) refers to a charter by Lewis le Debonnaire, who

"Gives to a laic Lord the lands of Villare Fontes, with *power* to administer justice, civil and criminal, within its bounds, and discharging all the judges ordinary from interrupting him in the exercise of that *right*."

When jurisdictions had become heritable, they were already things in the eye of the law—pertinents of property. —(*Jur. Rev.* ix. 428). In *Queen* v. *Keyn*, 2 Ex. D. p. 167, &c., examples will be found showing that jurisdiction is regarded as a power, and almost as a thing—an object.

A jurisdiction to impose fines is a valuable property. In old English the "*Gerihta Cyninges—Jura Regia*—rights of the Crown," are defined by Thorpe as

"Fines arising from certain offences, accruing to the King, and constituting a considerable portion of his revenue."—(*Glossary, s.v.*)

At the present day it is sometimes dimly hinted that some municipalities might not square their accounts if a

proper proportion of the citizens did not periodically become drunk and disorderly. The power of exacting fines may be "a liberty" of a burgh.

But the most common physical usage is the application to "the area of territory over which a court has jurisdiction." —(Dicey, *Confl. of Laws*, 207; Merchant Shipping Act, 1894, sect. 686. *Cf.* the phrase "districtum et jurisdictionem" in *Lib. Feud.* ii. 54.)[1]

SECT. XXX.—AUTHORITY.

(1.) *Auctoritas* is the quality of *auctor*, and may refer either to rights or duties. An *auctor* (corrupted into English *author*) may be the small tradesman who made something and sold it in his shop. He is an author, in several senses, of his goods. The purchasers take a good title from him as their *author—assignatus utitur jure auctoris.* The law of copyright illustrates the confusion between "an author," in the popular and the legal sense, and "a publisher."—(*Jur. Rev.* xii. 217.)

(2.) The word *auctoritas* is applied to private rights in the Twelve Tables.—(Cic. *De Off.* i. 37.) "Authority" is still used in that reference along with "power," "jurisdiction," "privilege," and other phrases already examined. In the Finance Act, 1894, sect. 22 (2) (*a*), it is coupled with "power" of disposal; and again it is used for a title to act in the Bills of Exchange Act, 1882, sects. 22-26 of which deal with "capacity and authority of parties." "Capacity" suggests a right arising from some quality in the person himself; "authority" suggests a right arising from the act of some other person. The 21st section of the Sale of Goods Act, 1893, speaks of "the authority . . . of the owner," and also of "the seller's authority," in the same transaction. This double usage is similar to that of the word *beneficium*, already noticed (p. 108, *supra*).

[1] Is the idea personified in 4 Macqueen's Appeals, 339, where the House of Lords is spoken of as "the "great ultimate appellate jurisdic- "tion of the country"?

(3.) In the Roman law *auctoritas* was applied to official rights, as in the case of a tutor, or a magistrate, or the Senate.—(Brissonius, *s.v.*) Stair (iv. 1, 1) uses "authority" and "jurisdiction" of the Lords, &c. indifferently.

(4.) The application of *auctor* to the instigator of a crime suggests "capax doli" (p. 72), responsibility and such ideas (p. 161).

(5.) "The word *auctoritas* is used to express the force and validity of statute law, of legal opinion, and decided cases."—(Smith, *Dict. Antiq. s.v.*) This is still a common use, as we find even the books quoted spoken of as *authorities.*

(6.) As authority means law, the word is applied to a higher power, which determines rights as a court—for example, the Railway Commissioners.—(*North British Railway*, 24 R. (H.L.) 30.)

(7.) The persons vested with official rights are "the authorities." So bodies are called "local authorities," "harbour authorities."—(Local Government Act, 1888, s. 100; Merchant Shipping Act, 1900.)

SECT. XXXI.—CRIMINAL RIGHTS.

Official rights, such as jurisdiction, suggest criminal as distinguished from civil rights.[1] Criminal rights, which we may here regard as the special rights conferred on persons by the laws dealing with criminals, may be regarded as a species of official rights, and hence, as we have seen, they are described as "privileges." As official rights they are generally represented as duties or laid down in the form of laws. We may regard the criminal as a person who pushes his ordinary rights to an extreme—*summum jus summa injuria.* He loves sport, but it takes the form of torturing or killing human beings. He defends himself against attack, but too often by killing his opponent. He has a desire for property, and so he takes what he wishes and removes by force or death any who stand in his way. Such conduct raises in

[1] Ersk. *Inst.* iv. 4, 105, 106; Lindley, *Jur.* 59; p. 89, *supra.*

others the natural right of self-defence, and would result in strife and anarchy. The criminal law attempts to restore order by recognising in private individuals some modification of the right of self-defence or other natural instinctive impulses, such as apprehending a felon in the act;[1] by giving public officials the right to arrest, the right to prosecute, the right to try and sentence, and the right to punish. We may compare Stephen's *Criminal Procedure*, Arts. 96-98, where the law is laid down in the form of *rights*, with the same author's *Digest of the Criminal Law*, Art. 220, where the same series of acts is put in the form of an exceptional law. The criminal law provides for the rights of the accused to notice, citation, trial, and all the formalities enacted to secure that no injustice is committed under the guise of justice.[2] The accused has a general right to freedom and to immunity from attack. The attack may be in the forms of legal process, and hence the protection of his rights by according to him the right to a regular and fair trial.

This point of view is different from that of Erskine (*Inst.* bk. iv.), who treats the criminal law in the same manner as Rousseau (*Contrat Social*, ii. 12) as being not a separate system of law but as the sanction of all other laws.

SECT. XXXII.—PREROGATIVE.

(1.) The Latin "prærogativus" refers originally to the Roman tribe or century which was called upon first to vote. It is naturally extended to the *title* which determined the right, and to the right itself. The word is used in a general sense by Ulpian as to the rights of provincials, "consuetudinem istam et hujusmodi prærogativas."—L. 4, § 5, D. *de off. proc. &c.* (1, 16).

(2.) The right of the Crown is the royal prerogative. Blackstone says that applies "to those *rights and capacities* which the king enjoys alone" (*Com.* i. 239). We may take

[1] *Cf.* Macdonald's *Crim. Law*, 3rd ed. pp. 251, 260, 280, 426, &c.

[2] *Cf.* Stephen, *Procedure*, Arts. 191, 198, 302.

Comyn's account of this subject though it is from a strictly technical point of view. According to this author (*s.v.*)—

"The king's prerogative comprehends all the liberties, privileges, powers, and royalties allowed by the law to the Crown of England."

"It was enacted 'Quod magna charta teneatur tam in his quæ ad regem pertinent, quam ad alios,' and therefore no prerogative of the king can be claimed contrary to *Magna Charta*."

This assumes that the rights of king and subjects were equally provided for by law. Among the enumerated *prerogatives* are included—

"*Dominion* of the sea;" "*authority* to send ambassadors;" "to make leagues;" "to make reprisals;" "and so, if a subject of a foreign prince or State takes or spoils the goods of a subject of England, and his sovereign, upon a letter of request to him by the king, refuses to do right, the king *may*, by his writ, arrest the body or goods of him who did wrong." "The king has the sole *authority* to declare war or peace." "The king, by his proclamation, *may* enforce the execution of laws." "The king has full prerogative and *jurisdiction* to do *justice and right* to all within his kingdom in all causes, ecclesiastical or civil." "The King of England is supremum caput ecclesiæ Anglicanæ." "This *title* of supreme head of the English Church was first attributed to the king by the clergy in Convocation."

At an earlier date the prerogative was spoken of plainly as the *rights* of the king:—

"Hec sunt *jura* que Rex Anglie solus et super omnes homines habet in terrâ suâ, commoda pacis et securitatis institucione retenta: infraccio pacis regie per manum vel breve date: denegildum: placitum brevium vel preceptorum ejus contemptorum: . . . quincunque despectus vel maliloqium de eo: castellacio trium scannorum: utlagaria: furtum morte impunitum: murdrum: falsaria monete sue: incendium: hamsocna," &c.—(Thorpe, 224; Leges Regis Henrici I. x.; *cf.* Pollock and Maitland, i. 495).

Erskine speaks of the prerogative in the same way (*Inst.* iv. 4, 105, 109; *cf.* i. 5, 14).

(3.) "Sovereignty" is sometimes applied to the group of political rights vested in the ruler; but in so far as the idea belongs to law it may be treated as synonymous with "prerogative." When a person or a group of persons claim sovereignty, it becomes the object of a right—a thing—like

jurisdiction or dominion, and the person has a title thereto which may be discussed.

Popular usage has no difficulty in delegating the right, and in dividing it according to interests—spiritual or temporal—or over areas. The problems of ultimate sovereignty are really metaphysical.—(Bryce, *Studies*, ii. 49.).

SECT. XXXIII.—SO-CALLED "RIGHTS OF GOD."

In passing we may notice a usage which connects right as vested in a person with law in general as a system of order to which all beings are subject. The rights of God are precisely similar to the rights of a king. It was a common idea down to the time of the Schoolmen to regard God as the legislator who enacted the Divine law. Suarez entitled his great work "De Legibus ac Deo Legislatore."

The phrase "rights of God" is used by the 1738 translator of Grotius (*De J. B. et P.*, Prelim. Disc. 49). Again [God's] "actions may be grounded on the sole right of his sovereign dominion and jurisdiction over us" (ii. 20, 4, 2).

Pufendorf (*Law of Nature and Nations*, ii. 4, 3, Dr. Kennet's trans.) speaks of God, "Who by virtue of His *imperial right* hath enjoined men such certain duties by natural law."

This is an anthropomorphic conception in accordance with the idea of legal relations between God and man—covenants, laws, judgment, and so forth. God has rights over man because He is his Maker and has therefore a legal title to treat him as His property. He is also his Ruler, Who has enacted laws for him. The whole system of oaths and vows is founded on this idea. These give God contractual rights over man.—(See pp. 126, 153, *infra.*) Professor Lorimer, while denying that man has rights as against his Creator, maintains the converse.—(*Inst. of Law*, 2nd ed., pp. 205, 210.) This denial is a theological adaptation of the proposition that the king can do no wrong.

SECT. XXXIV.—TRANSMISSION OF RIGHTS.

Formally all rights are alike, whether of a monarch to an empire, a judge to his court, a merchant to his fleet, a crofter to his plot, a child to his toy, a dog to his bone,—if in these last cases we may presume to know the mind of the subject. It is, in the first instance, the object of rights —the interest—that makes them differ. But the object takes its character from the mind of the person claiming the right—from the physical power of enjoying and enforcing it,—and ultimately from the ideas and institutions of the society to which the claimant or the possessor of the rights belongs. We are here confronted with a metaphysical problem, which haunts the practical lawyer at every turn, but which he generally resolves in the practical way in which Samuel Johnson disposed of Bishop Berkeley's idealism.

For this reason theoretically the *transmission* of rights is impossible and absurd, although in practice we confuse *tradere rem* and *tradere possessionem*. A succession or an assignation is merely a title.[1] Being vested in a different person, the feeling of claim is necessarily different, and it is only for certain practical purposes, such as the investigation of title, that technical law treats the right of the author and of his successor as the same. Indeed for many purposes it is quite immaterial that the father or any ancestor of the present proprietor was a former proprietor. The rights of the present proprietor generally depend on the fact of proprietorship or possession, and not on the fact that he was once an heir or a successor or purchaser.—(*Cf.* Holmes, *Common Law*, Lects. x. and xi.) It is admittedly a fiction to say that the heir is "eadem persona cum defuncto:" but it is as much a fiction to say that an estate is the same thing

[1] *Cf.* Sale of Goods Act, 1893, sect. 21 *et seq.* The rubric speaks of a *transfer of title*; but the right of the owner and the act of the seller, coupled with his authority, or the consent or conduct of the owner, which bars his right, are all elements in the new title of the vendee. These sections afford another illustration of the confusion of *right* and *title* (p. 76, *supra*).

to every proprietor. One may value it for the scenery, another for sport, a third for grazing sheep, and a fourth for minerals. When once a person has been proprietor, his affection for the estate may not cease even when he has sold it. All conveyances provide against a demand by the seller for restitution. He may still have an interest, but it is not one recognised by law. And even when a court tries to decide whether A. or B. is heir to X., the possession of X. and his death are facts or titles which enable the court to decide who has the title of heir, and therefore present rights as proprietor.

SECT. XXXV.—RIGHTS ORIGINAL, SECONDARY, ETC.

We may now understand how rights come to be arranged as original, natural, or divine, and primary, secondary, tertiary, and so forth, as far as we choose to proceed. Thus—

1. The right (law) of Nature or of God gives certain general rights—life, feelings, will, external things, &c.;
2. The right (law) of the land gives rights of liberty, property, succession, &c.;
3. By a right of succession on the death of A., X. succeeds to his whole estate, including lands;
4. By right of proprietor, X. claims rent from T., a tenant;
5. By a creditor's right X., on T.'s failure to pay, attaches his goods;
6. By a similar right, on T.'s failure to redeem them, X. sells the goods and pays himself a sum to account of rent;
7. By further rights X. claims in T.'s bankruptcy, or exacts payment from a cautioner, and so forth.

The true rights are those which are asserted in an action. The rights prior thereto are titles or elements of a title, while the subsequent rights are so called because they may be put into force in detail on the concrete circumstances arising.

Each right is one link in a great chain. The only right in such a case as is here sketched may be to take payment of the rent due. The other rights are so called because they are necessary acts connecting the claimant or society with the debtor-tenant. For some purposes we can treat each link as the whole chain. Just as the breaking of one link is the breaking of the chain, so the alleged debtor may attack the alleged creditor's claim at one point, which then appears as a particular right. Professor Holland proposes to call certain rights antecedent and other rights remedial. In one sense all rights are remedial, because it is the disturbance of the concrete relation that reveals the existence of original rights and creates legal rights. Rights of action are generally called remedies (see Broom's *Legal Maxims*, 7th ed. p. 150), and it thus appears to be an unnecessary metaphysical distinction to call a right in the precise form which it may assume prior to action a remedial right. It may happen that the secondary right—the so-called remedial one—is preferred by the wronged creditor to the original right.

Rights are also conceived as arranged in an ascending scale of higher and wider interests. Thus we have in regard to a single case—

1. Private rights of an individual—rights of action, &c.;
2. Jurisdiction of judges, &c. (official rights);
3. Sovereignty of the ruler (political rights);
4. International right or law, as in the practice of intervention, &c. (p. 128, *infra*).
5. The Divine Sovereignty (so-called rights of God); and
6. Some would add absolute right, which God Himself must obey.

What this last means, or if it means anything, and the relation of 3, 4, 5, and 6 to each other and to 1 and 2, are questions of metaphysics. As a general rule, the ordinary man, whose views mainly concern us here, makes these ideas intelligible either by the very crudest materialism, or by a spiritualism which ignores the facts of experience.

SECT. XXXVI.—COLLISION AND MARSHALLING OF CONCRETE RIGHTS.[1]

(1.) We have hitherto generally regarded rights as claims of a single person, or of a group to a joint undivided interest; or of a number of persons to an object, like a sum of money, which can be divided so as to satisfy them all. But suppose a single indivisible object is claimed by several persons. They may have different titles. They all have the feeling of claim which in certain circumstances we call a right. Then one claimant may admit the feeling of another, but maintain that his own right is prior, better, juster. He calls the feeling of his rival a right, from a polite deference to his susceptibilities. His claim is no right, but it would be a right if a preferable claimant were not here. Hence the interference of courts to determine competing rights—*i.e.*, claims—and make one of them a true right. How they proceed in so doing cannot be discussed here. It may be by declaring one claim to be false—a deliberate fraud; it may be by balancing titles, when one is declared to have a *greater* right—*majus jus*, the phrase used by Glanvill. This may mean a higher right in the eye of the law, such as *dominium*, compared with mere possession. It may be by some rule laid down in the public interest, such as giving servants, clerks, physicians for deathbed charges, and the Crown for taxes, a preference in bankruptcy. It may be by laying down a set of all but arbitrary rules to save time and prevent conflict.

Take the forms of summons in the Scots action of multiplepoinding (competition) (Sch. (A) Court of Session Act, 1850; Sch. (A) Sheriff Courts Act, 1853; and Sch. (A) Sheriff Courts Act, 1876). The holder of the fund asks that he should make only one payment to the person "who may have *just right* thereto," or pay the balance, after deducting expenses, to the person who "may be found to have the *best*

[1] See further on this subject the discussion of Justice (Chapter VI.).

right thereto." This shows that "right" may be only a subjective phenomenon in the mind of a claimant. The form of the 1853 Sheriff Court Act simply says payment should be made "to those having right thereto; and the defenders should produce their claims," &c., and "such of the defenders as shall be found to have no right should be prohibited from troubling him [the holder of the fund] in time coming." A claim may thus be merely a "pretended right," as the 1850 Act suggests.

(2.) We may also have conflicts in conjunct rights or common property among strangers (Bell, *Com.* i. 61). These must be resolved by means of contract or custom, or by resolving them into several rights.

(3.) So also in England we have conflicts of equities, and one claimant may have "a better equity" than another (11 A.C. 30.)

(4.) And once more, what is called the "conflict of laws" may be taken as a particular case of the conflict of rights,—one right recognised by a foreign law clashing with another similar right recognised by the native law (p. 130, *infra*).

SECT. XXXVII.—RECOGNITION BY SOCIETY OR THE STATE.

(1.) We have seen interference by society or the State, implicit in the forms of Obvagulation, Dharna, Fasting, and explicit in the action at law, in grants of privileges, benefits, prerogatives, and official rights, and finally in the solution of collisions between rights. Recognition by society is necessary to constitute all rights, even those of the Crown or of Parliament. The Emperor of all the Russias could not exercise his powers or rights of government unless his subjects acquiesced and obeyed, and surrounding nations and their rulers abstained from interfering with him. In early times the recognition is instinctive because society is imperfectly organised. At the present day, when the State is highly organised, and to the superficial

observer largely artificial, we can find all law defined as a command by the *de facto* ruler. But we have artificial rules demanded by the nature of the society to which we belong, and these are recognised by definite artificial courts consisting of a definite number of judges. We can speak of these as natural and artificial in the same way as we speak of all human creations as artificial or natural. As a result of this distinction we divide rights into natural or instinctive, and legal or conventional rights.

(2.) Rights are then classified according to their origin—the court, or the persons, or the document which creates the right. In the protracted litigation between the East Coast Railways we find distinctions drawn between "legal rights," *i.e.*, rights originating at common law or ordinary railway law; "statutory rights"—rights conferred by their special Acts; "contractual rights"—arising from agreement between the companies; and the special rights arising from arbitral decisions of the Railway Commissioners. These last are genuine rights, embodied in the actual use of rolling stock and rails, but they are not "legal rights" in a narrower technical sense.—(*N.B. Railway* v. *N.E. Railway*, 24 R. (H.L.) 19, and 25 R. 333.) This classification is according to *form*, whereas the distinction formerly noticed (p. 91) between "lawful" and "unlawful" interests was one as to matter—the objects of the rights.

(3.) The interference of the State and its courts thus gives rise to a distinction between forms and substantive right. Both are rights, but the latter in an especial sense. So Erskine speaks of "judgments on particular points of either *right* or of form" (*Inst.* i. 1, 47), and says they are "accounted part of our customary law."

(4.) In the early history of law we find devices to support and buttress up rights from the outside—attempts to fortify rights by society while the State was still weak for this purpose. Suretyship and pledge are such devices. These give the creditor an additional right or rights in support of

his original right. They fulfil extrajudicially the same purposes as the right in modern practice of appeal to the courts and of enforcing rights directly. They have survived their original purposes and have taken their place in modern practice subject to the iron hand of law, like all other legal rights. Suretyship is an extension of the obligation over the family in its personal aspect. Both this institution and pledge are an enlargement of the interest of the creditor.

The early English law of warranty illustrates the principle. As Pollock and Maitland show, "the primary obligation of the warrantor in old times was not that of making compensation. His obligation to give his tenant a tenement equal in value to that whence he had been ejected was but a secondary obligation arising from the breach of the primary obligation, namely, the duty of defending the tenant in his possession 'against all men who can live and die.' If the tenant was attacked by process of law, he vouched his lord, he called upon his lord to defend the action, and the lord if he did his duty defended it. Now here we see a great force at work. Do what we may to make all men equal before the law, a rich man has and must always have advantages in litigation; he can command the best advice, the best advocacy. But in the Middle Ages the advantages of the rich and powerful must have been enormous. Happy, then, was the tenant who could say to the adverse claimant:—'Sue me if you will, but remember that behind me you will find the earl or the abbot.' Such an answer would often be final. We must understand this if we are to understand the history of commendation. The owner of land who gives it up to a great man, and takes it back to hold by rent and services, receives a 'valuable consideration for the surrender and submission.' This is so even within the sphere of law and litigation; he has made his hold upon the land secure, for he has at his back a warrantor whom no one will rashly sue. We must add that he has a lord who may use carnal weapons, or let loose the thunders of the

Church in defence of his tenant."—(*Hist. of English Law*, i. 287, 2nd ed. p. 306.)

(5.) We may see here, too, another aspect of the criminal law. This may be regarded as an artificial system of rights set up in the State in order to fortify the rights of the individual. His rights in his person, his property, or his family are not merely his own; they belong also to the State, and it may be a duty to enforce them, though the individual may be tempted meekly to suffer injustice lest a worse thing may befall him. To obviate this wrong to society the State either compels the individual to prosecute the criminal or takes the prosecution out of his hands.

(6.) But as the State grew in strength the interference of rulers became more direct. They acquired rights which secured the rights of their subjects.

The opening book of Britton on the Laws of England deals with the royal rights. The ruler had a personal interest in the peace and order of his kingdom, and had a pecuniary interest in fines and forfeitures, as we have seen in the case of liberties and jurisdictions. In order to vindicate his own rights, the king vindicated the rights of his subjects and unconsciously made law. The coroner now represents the public interest; his name shows that he first represented the Crown.—(Britton, *op. cit.*; Skene's *Reg. Maj.* pp. 4, 6, 7, "The Crowner's office.")

The Mediæval Church was interested in pious bequests by its devotees, and it has transmitted to us the law of testaments and succession. It was only the other day that the name of the Ecclesiastical Court—the Commissary Court—was abolished in Scotland.

The Admiralty Court was to keep order on the seas and prevent disputes with foreigners. It had also forfeitures and profitable emoluments.—(Select Pleas, Selden Society, vol. vi.; Thomson's Acts, *s.v.* Admiral.) The Droits of Admiralty are still part of the Crown revenue.

The *Regiam Majestatem* begins by telling the fees of the

great Officers of State. The *Ordonnances* of the French Kings are arranged on the same principle. The rights of the king come first, and the first of these is the administration of justice. —(*Les Edicts et Ordonnances des Roys de France*, Lyon, 1571.)

But go back to the dimmest antiquity and we find the same thing. Babylonian and Greek priests, Roman pontifices, and kings like Khammurabi looked carefully after their revenues from fines and forfeitures, and incidentally administered law. Homer and Æschylus represent suppliants as under the protection of Zeus. A wrong to the suppliant is a wrong to the god and will be avenged. An injury to a slave is an injury to his master, an insult to a servant or a subject is an insult to his ruler:—"Inasmuch as ye did it not to one of the least of these, ye did it not to Me."

But the motives of rulers in administering law need not be pecuniary.[1] It may be to keep peace within their dominion; it may be to gratify the instinct of ruling; it may be to see justice prevail among men. But in all cases the claim of the ruler to legislate and to administer the law, and generally to govern, is put forward as "a right," and is recognised or disputed by his rivals or his subjects as a "right" in the same sense as the most obscure individual claims to own the clothes he wears and to work for a livelihood.

The development of the same idea is seen in international law. The rights of the individual become the rights of his State, and are enforced as such.

(7.) In a previous section (p. 91) we have noticed how law tends to materialise abstract ideas in order to make them intelligible. The converse is also true, that law cannot exist without treating the ideas, feelings, and claims of individual men as concrete physical facts,[2] which are made intelligible by social ideas and social abstractions. These ideas and abstractions are social in so far as they are from a different point of view from that of the individual. He must always be the centre of a circle, but it may be an ever-widening one:

[1] Bryce, *Studies*, i. 26.

[2] See note, p. 5.

SECT. XXXVIII.—RIGHT AS LAW.

(1.) Right may mean law in the old English and the modern German sense. It is so used in poetry—

> " When in, my dreadful husband and the world
> Broke,—and I saw him, master, by hell's *right.*"
> (*The Ring and the Book*, vii. 1586.)

It is so used also by some modern writers on jurisprudence, but it is doubtful if the revival or innovation is successful, and it is safe to advise the reader always to consider whether "right," even when used in a strictly legal sense and not in the moral sense of "justice," means "law" or "a right." Thus—

> " It would be useless to have right (*jus*) in a State, unless there are persons competent to administer it (*jura*)."—(Twiss, *Bracton*, i. 21.)
>
> " Likewise civil right, which may be called customary right, is a term applied in one manner to the statute right of each city; in another manner, to all which is not prætorian right, and sometimes it detracts from and sometimes it adds to natural right, or to the right of nations. Another right is sometimes acquired in cities approved by the custom of those who use it, than without; nevertheless such custom ought to be observed as law. Likewise civil right is a term applied to every [kind of] right which a city observes, whether it be natural or whether it be civil, or a right of nations, and such like."—(*Ib.* i. 25.)

(2.) If a right is not a "valid" right till recognised or enforced by the State or society, then it is easy to regard this recognition as *the* essential element of a right—right *par excellence.* This recognition is the *anima animai*, the very soul of right—the law in general, or the State as a whole; so the tendency to identify right with its elements is sufficient to explain this usage also.

(3.) "Rightful" is thus generally used as meaning "lawful," as when conveyancers speak of a "rightful owner."[1] His title is in accordance with law, but from a moral point of view may be unrighteous. But even this word has a technical usage, as meaning "possessing a mere right." Comyn (*s.v.* Action) explains that—

[1] Bythewood and Jarman, i. 7, and *passim.* In some old Scots Charters the word "righteous" is found in precisely the same sense.—Gifford's *Hist. Description of Zetland*, p. 63; *Reg. Majestatem*, ii. 55.)

"Real actions ancestral are possessory, viz., when the ancestor dies in possession; or *rightful* when only a right descends from the ancestor."

(4.) The institution of monarchy, with personal and at the same time official rights, which include the administration of justice and the enactment of laws, suggests personification of the State itself. If we personify the State or the nation, and regard the whole law—justice—the King's peace, as the demand which it makes and the obedience which it claims, we make one gigantic right. This is Right (*Recht, Droit*) in the objective sense of some German metaphysicians. In this sense there is only one right in the State, and one obligation on its subjects, viz., to claim and accord obedience to the law.

(5.) The right of an individual when recognised by a particular State is a positive right sanctioned by a positive law. Thus in *Castrique v. Imrie* (L.R. 4 H.L. 436) the phrase is used, "an English right," as meaning a right supported by English law, and which would be enforced in an English court. A right is truly a right when it has been submitted to a court as a claim, and has been "ranked and preferred" in the concrete. It occupies a still stronger position and perhaps a higher plane when it is such a claim as the courts of all civilised countries would recognise, because if recognised and enforced by only one State it may be truly unjust. The science of Private International Law tries to determine what are the precise conditions that entitle a claim to be treated as a right valid in more than one civilised country, and perhaps in the whole world.

(6.) But carry the recognition further. We may imagine rights to be recognised and guaranteed by God as well as by man in positive laws, and then we have the distinction of "Divine Right" and "Human Right."—(Grotius, *De J. B. et P.*, i. 1, 13; *cf.* p. 119, *supra*; *The Ring and the Book*, x. 279.)

And so right in respect of this element of recognition attains the highest moral idea which was even at first implicitly present in the idea of straightness, with which we

saw it started. From the humble concrete court deciding a single petty case, it goes up to the right of the State, to that of all civilised States, and finally to that ultimate idea of justice which seems ever to recede as concrete institutions and positive laws appear to approach thereto.

We see this in the practical discussions of the subject. The lawyer, by reference to his statute-book, and decided cases (Jurisprudence), will tell you the precise rights of a prosecutor, or of an accused person, as to a charge on any crime; but the question as to "the right to punish" and "the right to rebel" is discussed by philosophers, who expound the law of Nature, or theologians, who expound the law of God.[1]

SECT. XXXIX.—FINAL DEFINITION OF RIGHT.

We may sum up the result of our inquiry so far as having given us a definition of a right. It is a claim, a power, a faculty, a liberty, an authority, a privilege, a prerogative, a capacity to act or to possess dominion, empire, power, authority, immunity, status, or some interest put forward actively if necessary in the form of a case or action at law, and recognised by the State in accordance with right, law, and justice. Each of these ideas in turn, and for some special purpose, or in some special aspect, appears to be the essential element. It may be the actual deliberate claim of the subject, or the feeling which prompts the claim, or the substantial object claimed—the real interest—or the recognition by the State or society as representing the law. The word right is correctly and commonly applied to all these, and vulgar usage has even gone further and applied it to the corresponding obligation, which we must consider in our next chapter.

And to these practical definitions of right the philosophical correspond. We may, with Ahrens,[2] describe it as a

[1] *Cf.* Green's *Lectures*, ii. 486, 422; le comte de Vareilles-Sommières, *Les principes fondamentaux du droit*, chapters xxix. and xl.; Seeley's *Politics*, 78, 305, &c.

[2] *Droit Naturel*, i. 158.

claim or pretension; with Leibniz and Savigny,[1] as a power; with Kant, as a privilege; with von Ihering,[2] as an objective interest protected by law; or again with Kant,[3] as the external conditions of co-existence in society; or with Hegel,[4] as including morality and the whole life of human society.

At first the right and the thing are absolutely confounded; might *is* right. Then abstraction is made of the *particular* right, *e.g.*, possession, redemption, &c. But it was the Roman law which attained to the abstraction of a right in general—*jus* the soul, of which *corpus—res* was the body. Particular rights, then, become conventional things, and we end by using the tautology, right of possession, right of liberty, right of action, right of jurisdiction, &c., and we may almost say now, without talking nonsense, that a free man has a right to his rights; and it is right that by right he should have right to his rights. In other words, it is just (righteous, equitable), that by law a man should have liberty and power to maintain and protect his interests.

[1] *Obligationenrecht*, i. p. 4; *cf.* Holland, p. 79.
[2] *Geist des röm. Rechts*, iii. pp. 339, 351; (Meulenaere) iv. 328.
[3] *Phil. of Law* (Hastie), 45.
[4] *Phil. of Right* (Dyde), 40.

CHAPTER III.

BOND—OBLIGATION—DUTY.

SECT. I.—RELATION OF DUTY TO RIGHT.

(1.) Every right is in its first aspect a right to act. The "dominion over the creatures" is primarily a right to appropriate wild animals, the epithet "wild" implying the actual absence of law and society, though these exist elsewhere. It is then, secondarily, a right to exclude others—a right to interdict interference. Possession is a right to defend physical detention. Liberty or immunity is a right to be exempt from aggression by others, or a right to free and unfettered activity. These rights, even in their negative aspects, express themselves in active defence. "Exception" becomes "action."

So, in technical law, the first right is a right of action,—that is to say, it is the natural impulse of dominion and possession, regulated by society. The action is first an actual action—rude self-help. Then it is regulated self-help. Then it includes exceptions which are originally a form of defence; and finally it becomes identified with any legal procedure, till the very threat of an action becomes a means of vindicating rights—or, in some cases, of levying blackmail. The cheat makes a fictitious right to damages by making up a trumpery case. "Legal" process becomes illegal oppression.

All rights are in motion in this sense, that they are revealed to us in the living processes of aggression and defence. The conception of rights at rest is an anatomical abstraction reached by analysis only.

(2.) To right in every sense that is borne by that word there corresponds an obligation. If the right is legal, so is the

obligation; if the right is contingent, imaginary, or moral, so is the obligation. If a multitude of particular rights can be grouped into a single right like property, so may an indefinite number of particular obligations be grouped into a single obligation. This correspondence in idea is shown by the use of the words *jus* and right. *Jus*, we have seen, signifies a bond or tie as well as a right or power.

A phrase such as "Do me this right"[1] makes the right a single object of prestation, as well as of claim or demand. "Rectum" in mediæval Latin meant "dues or tribute," as well as "right," from the creditor's standpoint.—(Ducange, *s.v.*).

(3.) If we might venture to amend Savigny's definition of obligation as a dominion (*Herrschaft*), we might say, "an obligation is *the subjection* of one person to another to the extent of certain isolated acts of the former, which are subjected to the will of the latter."[2] *Obligatio* was a Roman technical term for a special tie. Two persons were united *in jure*. Why were they so united? Because they were *bound* by an *obligatio*. And why so *bound?* Because they had been brought together by a *contract*, or because by a delict one had unloosed the tie that naturally bound them. It was simply the shifting of the same metaphor into another word, as the mind struggled to analyse the relation. And so we go on, and ask why do men *contract?* Because they are *social* animals *drawn together* and already related, or because they are *attracted* by an irresistible and inexplicable internal force, or in obedience to *duty*.

In classical usage, "*obligatio*," like *jus*, meant the relation between a debtor and his creditor; sometimes denoting the claim or right of the creditor, and sometimes the duty of the debtor. How natural this usage is may be shown by the vulgar error of persons who ask, "What right have I to do this?" "Am I entitled to pay this sum?" when they mean

[1] Shakespere, *Taming of the Shrew*, i. 2. *Cf.* the form of Judicial Oath, 31 and 32 Vict. c. 72, s. 4: "And I will *do right* to all manner of people after the laws and usages of this realm."

[2] *Oblig.* i. p. 4; Holland, *Jur.* 229.

"Am I bound to do this?" "Am I bound to pay this sum?" or "What law compels me?"[1]

(4.) A right in its main aspects consists in doing something, or receiving and accepting something. So an obligation consists in performing some act—a prestation—or in refraining from performing an act. Even in this latter case the obligation may be resolved into acting, for it is an active inhibition of the subject himself from performing the act. The notion of obligation or duty seems to carry with it pain or suffering—passivity—and hereby it is distinguished from the pleasurable activity of right. We may generalise the idea as it appears in positive and negative servitudes. A positive servitude of passage over a field appears as a right of walking or driving over it by the owner of the dominant tenement. The obligation of the servient is to refrain from putting obstacles and perhaps gates on the path. A negative servitude of light appears as a right on the part of the dominant to interdict the erection of buildings on the servient, or to remove them when erected. The obligation is to abstain from erecting them, and if erected to remove them.

(5.) The same act in the same person, and with reference to another identical person, may appear either as a right or as an obligation. It depends partly on the feeling, the *animus*—*mens*—with which the person regards it, and partly on the recognition of this feeling by society. A person may hug a grievance till he actually makes it a part of himself, and will be more grieved to have it remedied than he ever was to have it at all. A very striking example is afforded by the "Court of Claims" set up by the King before the Coronation. The "services" to be rendered at this ceremony are regarded by the claimants and by others as special rights or privileges.[2] A person may buy a thing and feel it an intolerable burden to carry away; a person may sell a thing and be *bound* to deliver it, and yet rejoice to be rid of it.

[1] *Journal of Jurisprudence*, 1889, p. 42.

[2] *Times*, Dec. 5th, 1901, and following days.

The seller is bound to deliver; the buyer is bound to take delivery. This reciprocity runs through all relations from the most rudimentary physical relation of parent and child, husband and wife, master and slave, up to the glad obedience of love, devotion, and loyalty; it applies to the rule of an autocrat who is master and servant of his people, and to that "service which is perfect freedom." But in speaking of rights and duties or obligations as being throughout reciprocal, we must make sure that we compare them from the same standpoint of all parties to them. The right of a policeman to capture a thief corresponds to an obligation on the thief to go peaceably to the police office, as well as to obligations on the part of other citizens either to abstain from interfering or actively to assist in the capture. If the thief refuse to acknowledge his obligation, the policeman ties him physically and carries him. He is then "bound" to go. We should generally speak of the answering to an accusation, the clearing of his character, or the submission to punishment, as a duty incumbent on him as a good citizen. But the thief may defy society, and wish to be treated so far as possible as a thing. At the same time the police have a duty to their superiors to capture the thief, and a duty to the thief to treat him humanely; and there are corresponding rights in the superior official or in the thief to call the policeman to account. These rights and duties are similar to those imposed on the prisoner, even if he has been unjustly condemned to a period of imprisonment. He has rights, but these do not include a right to defy prison discipline. We shall see, however, in the following chapter that even the right and duty of resisting law and settled government may be imposed on a person who belongs for example to a body of conspirators. The law of this association is in conflict with the law of the land or of the wider society of the State. The relations may be different, but the resulting ideas and feelings of obligation or duty are the same.

(6.) The relation of proprietor between a person and a

thing is sometimes taken in modern law as a type of a right; and to this it is said there corresponds an obligation on all the world not to interfere with the thing. The practical view is that there is an obligation on an actual trespasser to make restitution or reparation. The obligation on A. B. C. D., &c. is an invention useful for some purposes and misleading in others. If, instead of appropriating a thing, you hire a porter to carry your bag, you have appropriated the services of this man. Lawyers will tell you that you have a *jus in personam*, whereas in the former case you had a *jus in re*; but the distinction which is apt to be overlooked is that you have now a living and conscious object of your right, instead of an inanimate one. The servant's will acts in creating the object. But you have also as much as in the former case a *jus in re* in the services of this man, and he has a *jus in re* in his job—in your employment. Why will porters fight for a commission, or fight to retain it? They are merely vindicating their *jus in re* against their particular world. When once a contract is made between A. and B., there are mutual rights and obligations from the ordinary point of view, but there are also obligations, of the same kind as in the case of property, laid on C. D. E. and all the rest of society to abstain from interfering with A.'s right in B.'s prestation and B.'s right in A.'s prestation.[1]

The case of *Lumley* v. *Gye*, 2 E. & B. 216, shows that a right to services is truly a *jus in re*, and so is in contrast to *Allen* v. *Flood*, 1898, A.C. 1, where the relation between the master and the servant alleged to be dismissed was not really contractual. The act complained of in the former case caused a contract to be broken; the act in the latter prevented a contract from being made. These cases show that the right which an employer has in the services of an employee is analogous to a right of property in a thing, and implies an obligation on all third parties to abstain from interfering with

[1] Professor H. Sidgwick has overlooked this point,—*Politics*, 2nd edition, p. 31.

the constituted legal contractual obligations between the original parties. In *Allen* v. *Flood* the question was not merely as to the right of the plaintiff to take employment, but as to the right of the employer to refuse it, and the rights of other workmen to refuse employment in the event of the plaintiff being employed.

In the subsequent case of *Quinn* v. *Leathem* (1901, A.C. 495) the principle in question was applied to the wider right of carrying on a trade. At p. 534, Lord Lindley said—"[The plaintiff] had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; *its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing.*" At p. 525 will be found an earlier *dictum* of Sir W. Erle to the same effect, and on the following page Lord Brampton quotes with approval a *dictum* of Lord Watson in *Allen* v. *Flood* as to the remedy: "Any invasion of the civil rights of another person is in itself a legal wrong, *carrying with it liability to repair* its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed."

(7.) It is sometimes suggested that e are obligations without rights in the laws as to education of children, vaccination, cruelty to animals, and such-like. It is admitted that the public—the State—has a general interest in the enforcement of such laws. This being so, the State has in every case taken the precaution of investing a certain definite individual, or class of individuals, with the power of prosecuting for penalties. The State invests these persons with an official right, corresponding to the definite obligation laid on the individual, as in the Infants' Life Protection Act, 1897,

or it may allow private prosecutors or common informers a right of prosecution. The *actio popularis* of the Roman and of the Scots law illustrates the device.—(D. 47, 23). In recent times the State has created crowds of government inspectors and police. Each of these may say "L'Etat c'est moi." If a shopkeeper is bound to have just weights and measures, an inspector has the right to examine and confiscate them if light.

(8.) This dispute is very much a logomachy. There are two elements in relation, and it is convenient to apply the word "right" to the one side, and "obligation" or "duty" to the other. The negative is seriously maintained by English writers, but they are misled by the accidental technical use of the word "obligation" in English law. The idea of obligation as a legal tie is late of appearing in English law, and we see it becoming detached from the general duty of restoring property lent or deposited.—(Pollock and Maitland, ii. 172, 183, 205). Rights may thus be said to have appeared historically before obligations were technically recognised, but to argue from this that rights can exist without obligations is like maintaining that the blood did not circulate in the body until the time of Harvey. The idea of right is perhaps simpler, or it was first distinguished because right and action were identical, and the technical right has been usefully expanded by analogy to all relations. Those who affirm that rights and obligations do not co-exist and correspond exactly, have merely omitted to notice that the term obligation and its synonyms have gone through a process precisely corresponding to that which we have examined in the case of "right" and its synonyms.

SECT. II.—THE BINDING FORCE.

(1.) Slavery is the starting-point of obligation. In this institution we find the physical meeting-point of the ideas of property, obligation, and political subjection. This is

shown by the Latin words *manus*, *mancipium*, *tenere*, which apply to things as well as human beings. The last applies to obligation as well as possession. The rod of the taskmaster is the symbol of dominion; it indicates right, power, authority, empire, on the part of the holder, but it also indicates no less emphatically the nature of the relation in which the subject or the person bound stands to the holder. We who know only in vague outline human relations in the distant past, and even those who describe them as contemporaries, but see only the surface, may consider that the relations of husband and wife, parent and child, master and servant, ruler and subject, are formally and substantially identical. But, as in modern law, the legal form of "corporation" includes many diverse associations of men, so in ancient law, persons might be roughly classed as slaves, whose duties were in many respects sharply contrasted. In its first conception, the idea is necessarily limited, but when men conceived themselves as servants, slaves, or subjects of their gods, it became possible to extend by analogy the ideas of obligation and duty to the whole of man's moral and religious relations, and to treat right and duty as being absolutely correlative. The history of substantive law may be regarded in one aspect as a history of this differentiation corresponding to the development of the human personality and the organisation of society.

The physical associations with "obligation" are evident in Stair's account of liberty. He explains (i. 1, 22) that

> "Obligation is that which is correspondent to a personal right, which hath no proper name as it is in the creditor, but hath the name of obligation as it is in the debtor; and it is nothing else but a legal tie whereby the debtor may be compelled to pay or perform something to which he is bound by obedience to God, or by his own consent and engagement."

Liberty, as Stair teaches, is abridged (1) by "obediential obligations" to others, as when furious persons or children are restrained; (2) by punishment; (3) by engagement, "whence restraint and incarceration of the debtor's person,

until he do all the deeds that are in his power for the satisfaction of his creditor"; (4) "by subjection unto authority"; and (5) "by bondage, slavery, or servitude" (i. 2, 4-9). Stair thus appears to make obligation the negation of liberty, as elsewhere we have seen liberty treated as the negation of obligation (p. 101, *supra*, and *cf.* Hobbes, *Leviathan*, chap. xxi.).

The question is asked, what constitutes the binding force of an obligation? The ceremony of delivery of a baton—*festuca*—physical submission by putting the arm round the neck, the private prisons of the early Romans—point to the power which enforces an obligation as being that of a private individual.

The person claiming the right acts—goes through a pantomine or real ceremony indicating the power which he wishes to exercise in enforcing his right. But the State in its very first attempts to regulate obligations interposes with its force. An action is the first form of law in the Twelve Tables, the Salic Law, and other codes. The State—magistrates or witnesses—assist and put their force at the disposal of the private individual. The debtor is regarded as bound now, because he was regarded by himself and his creditor as lawfully bound at first.

Finally, an obligation is an invisible bond. It is the feeling of the debtor, and not the power of the creditor or of the State. The feeling may arise because he is helpless in the hands of the creditor, and an appeal to the State would be useless—might even make matters worse. But it may ultimately arise because he has given his word, or because he knows or considers the claim to be really just. It may be the heartfelt gratitude of a slave who owes his life to his master.

(2.) The parable of the unjust servant shows that proceedings such as are there described were sufficiently familiar to the audience addressed, either as ordinary events, or tradition, or popular imagination. A king is described as making reckoning with his servants, and the narrative proceeds :—

"And when he had begun to reckon, one was brought unto him which owed him 10,000 talents. But forasmuch as he had not wherewith to pay, his lord commanded him to be sold, and his wife and children, and all that he had, and payment to be made. The servant therefore fell down and worshipped him, saying, Lord, have patience with me, and I will pay thee all. And the lord of that servant being moved with compassion released him and forgave him the debt. But that servant went out and found one of his fellow-servants which owed him a hundred pence; and he laid hold on him and took him by the throat, saying, Pay what thou owest. So his fellow-servant fell down and besought him, saying, Have patience with me and I will pay thee. And he would not, but went and cast him into prison till he should pay that which was due. So when his fellow-servants saw what was done, they were exceeding sorry and came and told unto their lord all that was done. Then his lord called him unto him and saith to him, Thou wicked servant, I forgave thee all that debt because thou besoughtest me: shouldest not thou also have had mercy on thy fellow-servant, even as I had mercy on thee? And his lord was wroth and delivered him to the tormentors (gaolers, *Liddell and Scott*) till he should pay all that was due."—(Matt. 18, 24 (Revised Version).)

We must not regard this as an obsolete institution of antiquity. It is at this moment competent in Scotland to apprehend and imprison a foreigner (including an Englishman or Irishman) from whom an alimentary debt is claimed, and who threatens to leave the country, until he find security to answer an action for the debt. Down to the year 44 Victoriæ such warrants were common for ordinary debts. Again, in the case of apprentices and workmen imprisonment was a recognised mode of *compulsitor*.[1]

(3.) There was a law of debt in Egypt prior to the eighth century B.C., which allowed a creditor to seize and imprison his debtor. We do not know that he was made a slave; the idea may have been penal, because debt was incurred by foolish and immoral extravagance, akin to dishonesty. This law was repealed by Bocchoris, who reigned about 812 B.C.; and the ground of the reform was that the bodies of the citizens belonged to the State and it required them for public services both in peace and war. The statement of Diodorus as to this reform (i. 79) is corroborated by Egyptian docu-

[1] *Jur. Rev.* xiv. 68.

ments, in so far as they make no reference to attachment of the person.[1] But while this was so as to private debts, the State reserved power to imprison its own debtors, as is proved by the Rosetta stone, where the liberation of prisoners is mentioned.[2] But we find contract and slavery touching at other points. In polygamous countries it is difficult to distinguish between slaves and inferior wives; but in ancient Egypt the law as to slaves was extremely humane and their personality was recognised in many ways. M. Revillout[3] gives *in extenso* a curious marriage-contract, dated in the fourth year of Psammeticus (667 B.C.), between a woman Tenesi, the daughter of Anachamen, and Amon, son of Put'a, whereby she conveys herself with all her property, and "even the clothes on her back," to Amon for ever and ever. She expressly calls herself his servant. The deed is evidently an inferior kind of marriage-contract, in the form of a sale, by the woman herself. This comes very near a personal obligation. M. Revillout compares the relation of these parties with that institution which is referred to in the Book of Exodus.[4] At a much later date we find the canonists speaking of marriage as a mutual slavery (*mutua quodammodo servitus*).[5]

(4.) We learn both from Diodorus and Plutarch (*Solon*, 15) that Solon forbade any one to lend money upon security of the person (ἐπὶ τοῖς σώμασι) of the debtors. Prior to this enactment the State was on the verge of revolution owing to the discontent of the poor. Plutarch says (13) that the whole people were in debt to a few wealthy men, as tenants cultivating their farms and paying a rent, or as hired labourers; or else they had raised loans on personal security and had become the slaves of their creditors, who either employed them at home or sold them to foreigners. Others had sold their children and had left the country.

[1] E. Revillout, *Obligations*, 204; Wilkinson, *Ancient Egyptians*, i. 310-312.

[2] *Records of the Past*, iv. 72; *cf.* Grenfell, *Laws of Ptol. Phil.*, p. 145.

[3] *Cours de droit égypt.* i. 105.

[4] xxi. 1-4.

[5] Decr. II^da pars 32, 2, 3.

Solon poetically transfers the idea of slavery from the poor Athenian debtors to the land which was mortgaged. Here again we find the boundary stone (ὅρος) on which was inscribed a notice of the amount of debt. These as a badge of the slavery of his native land Solon overthrew :—

> "συμμαρτυροίη ταῦτ' ἂν ἐν δίκῃ χρόνου
> μήτηρ μεγίστη δαιμόνων Ὀλυμπίων
> ἄριστα Γῆ μέλαινα, τῆς ἐγώ ποτε
> ὅρους ἀνεῖλον πολλαχῇ πεπηγότας
> πρόσθεν δὲ δουλεύουσα, νῦν ἐλευθέρα." [1]

A poor tenant in ancient Greece, or modern Ireland, or India, who has mortgaged his plot of land to a usurer, and hardly finds subsistence for himself and his family after satisfying in part the claims of his creditor, may well envy the lot of a slave. His freedom exists only in name. The creditor may be more exacting than a taskmaster.[2] Thus history shows that the poor, when the burden of private debts and obligations becomes intolerable, come to regard it as imposed by the State. The transition from private wrong to political wrong is easy, for if the State can relieve the burden by force, and if it fail to put forth its power, it becomes responsible for the existence and the continuance of the wrong. And if the rich are the governing class, it is easy to identify the public with the private oppressors.[3]

(5.) We may see the close association of ideas between mortgage and slavery in the history of Nehemiah, where he describes the outcry of some of the Jews against their brethren. They had mortgaged their lands, vineyards, and houses : they had borrowed for the purpose of paying tribute :—

> "And, lo, we bring into bondage our sons and our daughters to be servants, and some of our daughters are brought into bondage already ; neither is it in our power to help it ; for other men have our fields and our vineyards."—(v. 5, Revised Version.)

[1] Aristotle, *Constitution of Athens*, 12, 30. See note as to boundary stones in Sandys' ed. p. 45.

[2] *Cf.* Baden-Powell, *Village Communities in India*, 136, &c.

[3] See Beauchet, *Dr. ath.* iv. 458 *seq.*, as to imprisonment in other States than Athens ; *cf.* Dareste, &c., *Recueil des inscr. jur. grec.* i. pp. 208 and 282.

Nehemiah relates how he obtained the cancellation of these debts.

(6.) The transference of the idea of slavery from the owner to his land by Solon, as well as by the Jews in the time of Nehemiah, is explained by the fact that in a remote antiquity men personified things. They tried and punished them as responsible for wrongs.[1] In England, down to little more than fifty years ago, any animate or inanimate thing that caused the death of a person was forfeited to the King and devoted to pious purposes, as Deodand.[2] This personification still survives in the maritime lien for damage caused by collision of ships.—(Holmes, *l.c.*)

It was no doubt a similar personification of land estates which suggested the word servitude; so that the framers of the French Code found it necessary to state that "servitude established no pre-eminence of one estate over another."[3] The Greek translation of servitude by *δουλεία* brings the idea more clearly before us. And may we not imagine that there was some popular fallacy which provoked the maxim "Res sua nemini servit?"

(7.) The history of Rome also affords illustration of the connection of debt and bondage. The *nexum* was a legal transaction, suggesting binding, tying, and slavery. At an early period imprisonment, if not slavery, was the compulsitor to enforce payment of debt, and the rich Patricians at one time filled their houses like prisons with debtors. The abuse of the rights of creditors became a menace to the State, and was dealt with in the Twelve Tables; but the ultimate remedy was, like that of Bocchoris and Solon, to restrict the right of the creditor to the goods only of his debtor.[4] *Cessio bonorum* is a process still recognised in Scotland, although imprisonment for debt has been practically abolished.

Slavery and condemnation to work in mines were also

[1] Arist. *Const. Athens*, 59; Plato, *Laws*, 873, E.

[2] Holmes' *Common Law*, Lect. I.; Pollock and Maitland, ii. 471.

[3] Art. 638; Holmes' *Common Law*, 383, &c.

[4] Muirhead, *Roman Law*, 2nd ed. 93, 153.

recognised as punishments in Roman law.[1] It was the punishment next to death (L. 28, § 6, D. *de Pœnis* (48, 19)). In more recent times Russian criminals of the worst class were sent to work in Siberian mines.[2] Penal servitude as a punishment for crime is a virtual slavery under British law.

(8.) In the formulæ of Marculfus (ii. Nos. 27-28) we find another application of the same idea. There a debtor undertakes to work so many days a week for the creditor while the debt is unpaid, or gives him power to sell him as a slave in satisfaction thereof. In the form given by Beignon (No. 26, p. 237, ed. Paris, 1665) a solemn pantomime is described, wherein the debtor allows the creditor to place his arm on the debtor's neck, and make him a slave in case of default in payment. Although this collection is later than Justinian, the forms themselves are no doubt much older. The ideas involved are not unlike those of the old Egyptian marriage-contract already quoted. They both imply that through the notion of ordinary slavery the person has come to be as it were technically proprietor of himself. His personality is split up into the person who contracts, and the personality in his body or the *status ingenuitatis* which he alienates.—(Bruns, 386.)[3]

(9.) Mr. Cleasby (*Icelandic Dictionary, s.v.*) says that the word "skuld," which means a debt or due, "in the oldest law means a kind of serfdom or bondage, in payment of debt, like that of an *obæratus* or *nexus* in the Roman law."—(*Cf.* Grágás I., 205, 232, 234.) This word is the same as the German *Schuld*, which means first crime, trespass, and then debt. These words are connected with the German "sollen" and the English "shall," "should," which will be dealt with hereafter (p. 171, *infra*).—(Kluge, *Etym. W. buch, s.v.*) Pro-

[1] Smith's *Dict. Ant. s.vv.* Metallum, Pœna; Mommsen et Marq., *Ant. Rom.* x. 334.

[2] George Kennan, *Siberia*, London, 1891.

[3] In the additional *formulæ veteres* of Beignon, we find a conveyance (*Obnoxiatio*, No. xvi.), and in the following collection a *Venditio de semetipso* (No. x.). Was the price received a *peculium*? *cf.* L. 21 D. *de Statu hominum* (1, 5). The earlier Roman law overcame the difficulty by the appointment of a *vindex—assertor libertatis*—who supplied the necessary *persona*. (Gaius, iv. 21; Muirhead's ed. p. 278).

fessor Skeat says that the derivation of *Schulter*, shoulder, is uncertain. Is it not that part of the body on which a burden is laid?

(10.) We may say that early law had not yet distinguished real and personal obligations. A bond for money might involve what we should call a pledge of the debtor's body. The confusion is caused by the ambiguity of the *interest* which the obligation affects. Is this interest an external corporeal body, or the soul—the personality—of the person interested in it? The close connection between personal debt and the body of the debtor is shown by the phrase *ἐπὶ τοῖς σώμασι* used by both Aristotle and Plutarch.[1] That the rights over the debtor's body were real is shown by the provision of the Twelve Tables as to division of the body. Those who wished to bury it had first to redeem it from the creditor.[2] Diodorus mentions a curious law of the Egyptians which recognised a pledge of the bodies of one's relatives or ancestors. This probably acted as a compulsitor by preventing the regular burial of the debtor.[3]

The punishment of dead bodies is an exemplification of the same idea. Thus the bones of the sacrilegious Alcmaionidai were disentombed and cast beyond the borders of Attica.[4] The trial of the dead body of his predecessor by Pope Stephen VII., described by Browning,[5] is another example. The treatment of the body of Cromwell by the Royalists appears to us horrible and contemptible; but it was natural and significant,—a revival of a lower and earlier order of legal ideas.

(11.) There is another institution which forms a link between dominion, slavery, and free contract,—that is, serfdom. Legal provisions as to serfs are found in the Code of Theodosius as well as in that of Justinian. They were free,

[1] *Const. of Athens*, 6, 1, 9, 1.
[2] Ihering, *Evolution of the Aryan*, 56.
[3] Diod. Sic. i. 93; Wilkinson, *Anc. Egypt*, i. 311.
[4] Arist., *Const. of Athens* (Sandys), p. 1, where the various accounts of this process are collected.
[5] *The Ring and the Book*, x.

but were bound to the soil, and might be sold along with it. They paid a rent to their owner. Of serfs there were two classes, one almost free peasants, and the other nearer slaves (*adscriptitii*) who had no property.—(Hunter, *Roman Law*, 3rd ed. 163. Smith, *Dict. of Antiq. s.v.* "Colonatus.") We meet this institution also in mediæval England; it was abolished in Russia only about forty years ago, and it explains the position of the French peasantry before the great Revolution. In form it varies, some cases being hard to distinguish from slavery, and others from absolute freedom. Sometimes the serf is bound to do work for his lord personally; sometimes to pay in money or kind. It is difficult to say whether this is a tax or a rent for the land, or a personal rent.—(Pollock and Maitland, *Hist.* i. 395; Maine, *Law and Custom*, 307.)

(12.) It has been already suggested in our discussion of right that the original sceptre was the measuring rod, required for making allotments or adjusting disputes between the holders of allotments of land. But the rod has different purposes, and we may also see in the sceptre of the king a lineal descendant of the rod of the taskmaster—on the one hand, political subjection gilded and ornamented till it becomes a pleasure as well as a duty to loyal subjects: and on the other, a stick to remind the slave or the criminal dreaming of what he calls freedom that he has a heavy burden of duty. The baton, the badge of dominion; the Roman fasces and axe; the spear in Roman mancipation; the festuca in Roman and mediæval conveyances; the staff and baton in modern resignations of lands in Scotland; the delivery of a pen in the later Scots law; the truncheon of a special constable; the cane of the schoolmaster; the baton of the conductor of an orchestra; the baton which authorises an engine-driver to proceed on a single line of rails; all these are symbols of authority and right.

On the part of the obligant or subject the symbols are equally significant. They all imply subjection, which may

vary from absolute slavery to willing co-operation on the part of the nominal subjects.[1] The Egyptian and Assyrian sculptures show political subjection by portraying groups of men awaiting death, kissing the ground before the king, or standing with their arms tied behind them as in the rock sculptures of Darius at Behistun. "He hath put all enemies under His feet." The Romans had the ceremony of passing under the yoke. Marculfus, in the case alluded to above, represents the debtor as allowing the creditor to put his arm on his neck: in mediæval homage the vassal placed his hands within those of the superior.[2] In Assyrian sculptures we see captives clasping their hands as if in prayer. This attitude means the abandonment of arms and of active resistance. Prostration or kneeling is an unfavourable attitude for attack, and so emphatically signifies subjection.

With the Egyptians political subjection and slavery might be synonymous, for the conquered peoples became State slaves; but when subjection meant merely the regular payment of tribute, the idea of abstract obligation was almost suggested. The Assyrian Kings enslaved nations, while the individuals enjoyed comparative freedom. At the present day, when it is wished to apply an opprobrious term to a political or social relation, it is described as slavery.

The distinction between civil and political rights and obligations is not always drawn. Solomon's glory was largely gold, material wealth, and slaves. A king was a great proprietor. So in Egypt the wealth of the king enabled him to maintain standing armies without what we call taxation.[3] In our own country the distinction has been facilitated by the squandering of the royal patrimony by some English and Scottish kings. The royal state must be preserved, and so it has to be maintained by contributions and payments from his subjects—*political* payments.

[1] Spencer, *Sociology*, ii. 176: Pollock and Maitland, ii. 184; Pardessus, *Loi Salique*, 616.

[2] Britton (Nichol's ed.), iii. 4, 17. *Cf.* the Latin phrase *dare manus*, to surrender.

[3] Grenfell, *Laws of Ptol. Phil.* (Int. of Prof. Mahaffy), xxvii.

The Temporal Peers in the House of Lords are a survival of the same idea. Their great possessions, which they originally acquired as a reward or payment for real or supposed services to the State, have given them a pre-eminent interest in the State. In fact, the king was only *primus inter pares*, and his peers naturally undertook and were expected to undertake political duties. To others were assigned lucrative political functions. The offices became hereditary, but as this became injurious to the State, the title was left and the holder was relieved of the duties. The peers have been deprived of most of their judicial and administrative functions except as representing the king's government; but they retain their property and the right of assisting in legislation, while their relations to their servants and tenants belong to the private law.

So loose has the idea of obligation become, and so generally diffused, that the word has almost lost its meaning in ordinary intercourse. Churchmen forget the contradiction involved in the Pope's description of himself as *Servus servorum Dei.* In ordinary usage the smallest feeling of gratitude may be described by saying, "I am obliged." But the ordinary formula of correspondence—"I am your obedient servant," "Yours faithfully," or even "Yours truly," do not imply the devotion of a slave, but merely that the writer—if he means anything—regards himself as bound to his correspondent by the ties of ordinary morality. And in some cases a title expressing duty or obligation comes to be associated chiefly with rights. The words "officer" and "minister" both afford examples.

(13.) Maine's formula of the progress of society from *status to contract* here presents itself in a slightly different form. Some men progress from *thing to person.* A slave is a rational, speaking thing. He may be allowed to contract, but when he fails to fulfil his obligations he is reduced to his former state. A slave is under obligation to his master—duties of *status.* But when he is freed his obligations of

gratitude become moral and in some cases legal. The duties of the master are few in his first *status*, but convention, public opinion, and then actual legislation alter these. The progress from slavery to freedom is simply the development of consciousness, which reveals rights, and this consciousness in the popular form of conscience, which reveals duties.

SECT. III.—PUBLIC AND SUPERNATURAL FORCE.

(1.) The primitive man was no psychologist. His first rude assertion of right was "action." This action was violence—binding and slavery. And just as unconscious analysis pushed back "action" to the antecedent rights implicitly involved, so the binding of the debtor in the *manus injectio* and such legal processes was found to imply a binding in the antecedent relation—an obligation or a duty. The person who bound himself by a formal bond was like a criminal who is liable to be sentenced at any time when called on. For the moment he appears free, but the potential slavery is always hanging over him. Again, the person wronged demanded reparation and revenge in one process, as these are still given in the modern French law. If he could not get sufficient reparation he took more revenge. The State for its own purposes put down private revenge, and found the process profitable, indirectly by protecting taxable subjects, and directly by exacting fines. The debtor was a criminal, or quasi-criminal, for the creditor did not care whether his failure was due to fraud, deceit, or innocent misfortune.[1] Nor did the debtor draw distinctions, because the effect on his person was the same. But, as in the case of rights, modern law has analysed the action on the side of the debtor, and has found that the remedial binding in action implies antecedent obligations of various degrees culminating in the ultimate idea of moral duty.

(2.) Our modern analysis shows us two parties *bound* to

[1] This idea actually survives in Erskine, *Inst.* i. 1, 4.

each other by contract or in some other way, and the State, the Law, approving, sanctioning, and enforcing the obligation resulting from the tie. But this is not explicit in ancient law. If the creditor is sufficiently strong he enforces his own rights. But if he is unable to do so, he procures assistance. To assist the individual creditor, who is helpless, the State or a superior is brought in *as an actual party*. The same ideas which, as we saw in the last chapter, led to the invention of suretyship, which is a device to make fulfilment sure by multiplying the debtors, or causing other persons to bring moral pressure to bear on the principal debtor, gave rise to the idea of making an obligation more secure by giving a truly powerful creditor the right of enforcement. There were always powers sufficiently strong for every debt. The private individual might secure his right through the Fisc, or the King, or the Church, or God; the King himself could always appeal to God, if his own power, or that of his earthly allies, failed. But this device gave the State a direct interest in the obligation, and secured the debt for the creditor. As we have shown how a single right might be analysed into a series of antecedent rights, so an obligation affected not only the principal debtor, but his family—children and slaves—and his property. Suretyship was an artificial extension of the family. It gave the creditor a new right, while his interest was still in one sense the same. It created a new artificial debtor, while pledge created a new artificial prestation. But the penalty to the fisc, or the oath to the gods, put another creditor alongside the original one to assist him.

Before men adopted these devices they had recourse to magic, like the West Indian negro of to-day. This is alluded to in the Babylonian contracts presently to be quoted, in which there is a special curse aimed at sceptical unbelievers. The Michaux stone, which is dated about 1100 B.C., contains a marriage settlement. It marks the boundaries of a piece of land conveyed by Sirusur, the son of Killi, to his

daughter. The rude figures carved on the stone are perhaps magical. The inscription (as translated by MM. Oppert and Ménant) consists of a description of the lands and most circumstantial denunciations of any who shall attempt to remove the landmark. The conveyancer of these days had no mean knowledge of theology, as well as of all the diseases, pains, and aches which might afflict humanity.[1]

In the later Assyrian deeds the curses are less elaborate. In one[2] the person attempting to challenge the conveyance "shall pay ten minas of pure silver and ten minas of wrought gold into the treasury of Istar, who inhabits the city of Nineveh," but in the following deed, an exchange of slaves, the formula of eviction is different. The person is to pay ten minas of silver, and invokes Assur, Samas, Bel, Nábu, or any other "as guarantee of his right" (*op. cit.* pp. 211, 213).

In the Sargon stone, which is four centuries later than the Michaux stone, the curses are by no means elaborate,[3] and in the documents of the time of Cyrus, two centuries later still, they have practically disappeared. In these there are penalties stipulated occasionally, without saying to whom they are payable. The priests and the government were so strong that they did not require to be more specific.[4]

M. de Coulanges (*La cité antique* (10th ed.), p. 72) quotes Roman and Etruscan examples, which prove that the practice was very widespread.

(3.) Turning to Egyptian remains, we find an example of elaborate invocation of deities in the treaty between Rameses and the Hittites.[5] This is similar to the Homeric example, presently to be referred to. M. Revillout points out that in Egypt, after imprisonment for debt was abolished by Bocchoris, the prisons were still full of the debtors of the king.[6] He quotes[7] an edict of Tiberius, in which this emperor

[1] *Records of the Past*, ix. 92; Oppert and Ménant, *Documents*, 85. *Cf.* the curses on boundary stones in the British Museum, Catalogue, p. 85.

[2] Oppert and Ménant, p. 209.

[3] Peiser, *Keilschrift. Acten-Stücke*, p. 9; *cf.* p. 21.

[4] Peiser, *Babyl. Vert.*, 17 and 169.

[5] *Records of the Past*, iv. 25.

[6] *Droit Comml.*, p. 116; *supra*, p. 142.

[7] *Obligations en droit égyptien*, 209.

dealt with the abuse of imprisonment on the pretext of the interest of the fisc, and prohibited imprisonment for the future except as to malefactors and public debtors. It seems that under the Ptolemies a stipulation for a penalty in favour of the king changed the jurisdiction and brought the debtor before the Royal Courts.[1] This procedure is similar to the fiction which originally gave the Court of King's Bench jurisdiction in England. As Blackstone (iii. 43) explains, the defendant was presumed to have committed a trespass which made him liable to pay a fine to the king.

In the Papyri published by Messrs. Grenfell and Hunt we find various interesting clauses illustrating this point. Thus in loans of wheat, dated in the second century B.C., we find a penalty of 50 per cent. for failure, and execution allowed in accordance with law.[2] Among the Oxyrhynchus Papyri,[3] also edited by these scholars, we find in documents of the first century of the Christian era the addition of penalties payable to the public treasury. In one case, dated 77 A.D., the sale of a slave-girl is intimated by declaration on oath by the Emperor Vespasian.[4] The seller Bacche, daughter of Hermon, with consent of her guardian, swears that the slave is her property, that she is sound, and that the price has been paid. Oaths by the Emperor are common in these volumes. Then in the sixth century A.D. we find two acknowledgments of debt by Flavius Psensoerius to Joannes, a notary of Apollinopolis. For the security of the creditor they are said to be "holograph with my own hand." The debtor professes his readiness to pay with God's help (*σὺν θεῷ*). The deeds begin with a cross. Perhaps this points to a supernatural sanction.[5]

(4.) We may take the treaty in the Third Book of the Iliad as a specimen of an early Greek contract. There the gods of both Greeks and Trojans are called as witnesses, and penalties are invoked on the party who shall break the

[1] *Obligations en droit égyptien*, 206.
[2] Ser. i. pp. 39, 50; *cf.* Ser. ii. p. 50.
[3] ii. 254, 256, 263; *cf.* i. 165.
[4] ii. 233.
[5] Grenfell and Hunt, ii. 139, 140.

bargain. M. Beauchet[1] quotes a passage from Theophrastus, in which certain sacrifices to Apollo or Zeus were required in the case of transfer of immoveable property. Polybius in a well-known passage[2] draws a contrast between the Greeks and the Romans in respect of their fidelity to contracts, very unfavourable to the former. Perhaps the Romans believed in their deities, while the Greeks saw nothing but witnesses and seals.[3]

In a passage of the Second Code of Gortyn a penalty is imposed in favour of the State when a person with whom an animal is deposited denies the deposit in a legal process. A similar penalty is imposed in another Gortynian decree, where the guarantors of a freed slave do not interfere by force, when an attempt is made to reduce him again to slavery.[4]

(5.) In the title of the Digest *De Jure Fisci* (49, 14) Callistratus enumerates among the grounds on which the fisc can claim rights "pœnam . . . ex contractu privato."

It will be more convenient to discuss later the Roman ideas of *Mos* and *Fas;* but we may notice here that the related ideas of *Fides* and *Fiducia* illustrate the point under discussion. Whether *Fides* was actually personified may be questioned, but through the stigma of *infamia* attaching to breaches of faith and other wrongs, a very operative sanction was added by society to the ordinary legal powers of enforcing obligations and duties.[5] The early belief in the gods, and in their power to punish perjury, makes an oath sacred, and enables early society to dispense with much of our elaborate machinery of law, although it must be admitted that it also gives rise to devices for evasion, and for satisfaction of the gods by other means than literal fulfilment.

(6.) In the formulæ of Marculfus the fisc is added as a party to secure performance if the granter, or his representa-

[1] *Droit athén.* iii. 326.
[2] vi. 56.
[3] *Cf.* Beauchet, iv. 56.
[4] Dareste, &c., *Récueil des incr. jur. grec.*, 394, 404.
[5] Hunter, *Rom. Law*, 431, note; Muirhead, *Rom. Law*, 49, 133.

tives, infringe the contract. Sometimes this is combined with the supernatural penalties of the Church. Thus we find in the style given for compounding a felony (ii. 18), the granter in case of a breach says—"inferamus tibi cum cogente fisco, duplum, quod nobis dedisti."[1] In many of the other styles we find examples of the *pœna dupli*—corresponding to the double bond which plays so large a part in the Roman and earlier English law.[2]

The Scottish practice of imprisonment for debt, which was modified and almost entirely abolished in 1880, was not much dissimilar. The process of putting to the horn, which made the debtor a rebel against the king, is described by Sir Walter Scott in *The Antiquary* (chap. 39).

But this mode of making obligation effectual extended beyond the sphere of strict contract. We find it in charters and testaments. Pardessus[3] observes—"The kings contented themselves in general by threatening with their indignation the breakers of the charter; nevertheless, there were many of them, whose sincerity cannot be doubted, where imprecations are inserted. . . . These clauses are very frequent in the deeds of individuals . . . Some present a sort of luxury of expressions, always directed to the divine vengeance and eternal damnation." An example of such curses in a testament will be found in Marculfus (ii. 17), and the volumes of the Charters of Cluny are full of the actual documents.[4]

The Babylonian priests and the mediæval notary alike appealed to supernatural fears. The person who feared and believed was effectually *bound*. The awful imprecations and denunciations of the ancient Babylonian and of the mediæval European documents prove the weakness of law and of the secular government, as well as the power of the priesthood. If a man can enforce his rights by means of a public or

[1] See also 22, 24, 32, 36; Bignonius, No. 23, p. 136, &c.

[2] See Ross' *Lectures*, i. 19. It was also used in Greek practice, Beauchet, iv. 431.

[3] *Loi Salique*, p. 644.

[4] *Cf. Essays in Anglo-Saxon Law*, p. 190.

private penalty, or by monetary interest, or by means of a surety, and all through regular legal officers, there is no need of invoking on his debtor the wrath of Baal or Astaroth, floods, famine, and plague, or the fate of Sodom and Gomorrah, of Korah, Dathan, and Abiram, of Judas, together with the eternal pains of hell. But, as we have already seen, later Babylonian and Assyrian documents are much shorter and simpler. In the Egyptian and Romano-Egyptian documents we find oaths and references to the Emperors, which may imply a great deal of the early religious pains and penalties, but law in these has absorbed religion.

SECT. IV.—SYNONYMS OF OBLIGATION.

As we have drawn up a table of words associated with right (p. 50), we may now draw up a similar table of words associated with obligation. An obligation may be regarded—

1. From the point of view of the respondent in litigation.—*Liability to action; responsibility; answer; ableness; no answer: no case;*[1] *guilt; sin, &c.*
2. From the point of view of the respondent, as an actual extrajudicial debtor.—*Liability.*
3. As the evidence or foundation of obligation.—*Written obligation; bond; office; motive, duty or interest; causa debendi.*
4. As the object of prestation.—*Obligations; services; offices; munera; debts; duties; burdens; charges; canon; kains; obligations, &c., real and personal, contingent, civil and political; subjection.*
5. From the point of view of the respondent, considering a possible claim.—*Liability (contingent).*
6. As special and official duties.—*Subjection to authority or jurisdiction; allegiance, &c.*
7. From the point of view of the judge deciding a dispute.—*Validity of obligation.*

[1] A *good* answer or a *good* case is a right.

8. As negative obligations.—*Duties; burdens, &c.*
9. From the point of view of the State and society.—*Duty; law; justice; validity, &c.*

SECT. V.—ACTION AND OBLIGATION.

(1.) "Obligations are the mothers of actions."—(*μητέρες γὰρ τῶν ἀγωγῶν αἱ ἐνοχαί*).[1] We may take this statement as applying to obligations in the modern sense, as well as to rights, for the Greek word merely represents the Latin "obligatio."

The proper unit of obligation is the object of a decree, for which force may be used—imprisonment or other—just as a right in the writ of right was such an object; and such a decree we may hold to be the true unit of law.

The close relation of right and obligation in connection with legal action may be illustrated from Scots procedure. Professor Holland (*Jur.* 85) has given an analysis of a right, but what the learned Professor is really analysing is an action. The plaintiff he calls the person of inherence, the defendant the person of incidence. Now this may be reversed. If we regard the obligation, the defendant is the person of inherence, the plaintiff is the person of incidence—the person in whose favour the prestation is to be made. Thus if A. sue B. for a debt and obtain decree, when B. in our former procedure "advocated" the cause to the Supreme Court or now appeals to it or the House of Lords, his name may be transposed as plaintiff in his character of advocator or appellant. In a suspension he would be complainer, and in a reduction, similar to the English procedure for rectification or cancellation, he would be the actual pursuer or plaintiff. Of course, in these latter cases, he is suing for the vindication of his right of liberty against an erroneous or unjust decree. But when he was formally defender he was doing the same.

[1] Theophilus, *Inst.* iii. 13; Fleta, ii. 56, 2; "Est mere de play"; Britton. i. 29, 2; Bracton, f. 99. *Cf.* "parit actionem," L. 42, § 2, D. *de proc. et def.* (3, 3); and Ll. 6 and 7, D. *de pactis* (2, 14).

In many cases it is merely a matter of convenience or accident who stands "pursuer" in an issue, but we associate generally rights with a pursuer and obligations with a defender. And just as we regard a relation sometimes as a right and sometimes as an obligation or duty, so it is possible to transpose the formal position assumed by the parties when they require to come into Court.[1]

We must not assume that pursuers and plaintiffs have always a true right, for there is often oppression under forms of law. In the age of self-help the aggressor must have been still oftener a wrongdoer, since he did not require to begin his process by submitting his claim to the judgment of a Court.

(2.) As rights are in their first conception rights of action, so are obligations liability to action—that is to say, successful action (p. 53, *supra*). Professor Hunter[2] points out that originally the question submitted for trial was "whether the plaintiff has made a true assertion, not whether he has a legal right, or the defendant has failed to perform a legal obligation." Next, "the question submitted for trial is whether the defendant *ought* to pay a sum to the plaintiff, that sum being in fact a wager as to the truth of an assertion. Another step, and we find the plaintiff claims explicitly *rem suam esse*, implying, but not asserting, that the plaintiff has a right of ownership." So it is a later step to say that the defendant is *bound* to pay or deliver something involved in a contract, and not merely that he should pay the sum stated as a wager in the special process. As law progresses, the questions into which the Courts inquire are pushed further and further back. We can trace this development in the history of the Latin word "reus." At first it means a party to a cause, and is so used in the Twelve Tables. Then it means specially the defender and the accused. And finally, it means the debtor in a contract, as

[1] Another example will be found in Bracton (f. 98*b*), "[a defendant] in demurring may sustain the part of a plaintiff."

[2] *Roman Law*, 125.

in the common phrase "reus promittendi."—(Hunter, *Roman Law*, 454); and it also applied to criminal guilt in the phrase *mens rea*.

(3.) In the early English action for debt to enforce an obligation *in genere* we are told, "the plaintiff rested his claim on a simple extrajudicial promise, and not on a 'causa debendi' or assertion of right. The judge pronounced no judgment on the validity of the obligation, or whether it was a real ground of action. It was not a suit in the modern sense, but an application to the Court to carry out a judgment made by the plaintiff. When the debtor refused payment after the demand, he was thereafter fined for 'borh-bryce'"—a payment to the Crown as for breach of the peace.—(*Essays in Anglo-Saxon Law*, 192, 279.)

There is a distinct idea in some cases that the judicial award is a reward to the plaintiff and a punishment to the defendant. This might be simply the result of clever pleading of the one or stupid pleading of the other. In the legal game the plaintiff won. This was his right, and the foundation of his right.

(4.) We have seen that a person who has a right is said to "have a case"—a right of action. In like manner a person accused must be guilty of something. The mere trial, the accusation, the very suspicion is a stigma—*crimen*, a charge, becomes *crimen*, a crime. Thus all words that imply judgment take to themselves the meaning of condemnation, as if there could be no other judgment (*cf.* κρίνω, *judico*, doom, judgment, &c.)

Mr. Justice Holmes points out (*Common Law*, 82) that Austin regards "the liability to an action as a sanction, or, in other words, as a penalty for disobedience." This is a popular idea on the part of those who seek revenge by civil procedure, as well of those who have to endure the burden of the cost. The Workmen's Compensation Act of 1897 (60 and 61 Vict. c. 37) in section 1 (2) (*b*), uses the phrase "the employer . . . shall not be liable to any proceedings,"

which appears to adopt the Austinian view.[1] In the case of *Munster* v. *Lamb* (p. 58; *cf. Primrose*, 4 F. 783) "liable to an action," "answerable in damages," "can be put to answer," are used indifferently. The most familiar example of this idea is the notice "Trespassers will be *prosecuted*," which in Scotland means nothing but liability to an action for interdict. Successful prosecution is suggested (p. 53).

SECT. VI.—RESPONSIBILITY.

(1.) Responsibility corresponds to the idea of action and right. The early Roman procedure took the form of claim and answer before the Prætor, and Gaius (iv. 16) gives the very words of the formulas employed. This form was also used extrajudicially in the *Sponsio* and *Stipulatio*.[2] In mediæval law essoins or excuses for non-compearance bulk largely.[3] The aim of the procedure was to compel the defendant to appear and answer,[4] and in criminal procedure the Courts at a later date resorted to something like torture to compel the accused to do so.[5] In the Ecclesiastical Charter of William I. of England we read "ibique de causa vel culpa sua respondeat."—(Thorpe, 213; Melville and Bigelow, 354.) A respondent is now bound to answer or he may be held confessed. If he has a good answer this will be the limit of his obligation.

(2.) The usage is then extrajudicial. The person was convened to the action because he was liable, and hence the words "liable," "responsible," "answerable," "bound" are used interchangeably. *Respondeat superior;*

"The master is *responsible* for the acts of his servant, and that person is undoubtedly *liable* who stood in the relation of master to the wrongdoer."—(Cited in Broom, *Maxims*, 6th ed. 844.) *Cf.* Workmen's Compensation Act, 1897, section 1 (2) (*b*).)

[1] *Cf.* Local Government Act, 1888, s. 100, and Scottish Act, 1889, s. 105, "Liabilities."

[2] Muirhead, *Gaius*, 210; Bruns, 382.

[3] *Regiam Majestatem*, i. 8.

[4] Pollock and Maitland, ii. 592, 605.

[5] Stephen, *Hist.* i. 298.

Section 79 of the Taxes Management Act, 1880, deals, according to the rubric, with the "liability of parishes." The enactment itself says—

"No parish shall be answerable for the acts, neglects, or defaults of a collector appointed by the Board . . . nor shall a parish be liable to be re-assessed for an arrear or deficiency of the land tax or the duties arising from any default or failure of such collector."

The Merchant Shipping Act, 1894 (sect. 503), says that shipowners shall not be "liable to damages" beyond a certain amount, while the repealed Act of 1854 (sect. 504) used the phrase "answerable in damages."

The Lord Chancellor (Halsbury) uses the phrase "responsible in damages for injury" in *The Canadian Pacific Railway* v. *Roy*, (1902), A.C. 228.

(3.) We next speak of a *responsible* cautioner or a responsible person, *i.e.*, a person who could fulfil his obligations if called upon.—(*Ex parte* Harrison, 28 Ch. D. 369; *cf.* "a responsible bidder," Bouvier, *Dict. s.v.*)

(4.) Then we transfer it to things:—

"Incorporeal rights also . . . are responsible to creditors under certain restrictions; and finally, moveable property . . . may be applied by creditors to answer the debts of the owner."—(Bell, *Comm.* i. 18; *cf.* p. 121.)

"The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ*. No responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against."—(Quoted in 6 P. D. 150.)

(5.) Responsibilities are responsibility in a concrete form.

SECT. VII.—GUILT—SIN.

(1.) The English word "guilt" reflects in its history some of the ideas associated with "obligation." According to Professor Skeat (*Dict., s.v.*) it probably means originally "a fine or a payment by way of recompense for a trespass; and the word is to be connected with the Anglo-Saxon *gyld*, a recompense. Both words are from the Teutonic base *GALD*,

to pay, whence Anglo-Saxon *gyldan*, to pay, yield." He connects it with the English *yield*.[1]

(2.) "Guilty" and "not guilty" are now used in criminal procedure. The accused is called on to answer to a charge by the formula "Guilty or not guilty?" But in England the plea of "not Guilty" survived till recently also in *civil* procedure, and is still pleadable under certain restrictions.[2] This latter usage is not known in Scotland, probably because the establishment of a public prosecutor makes a clearer line of demarcation between civil and criminal procedure.

(3.) Guilt is now treated as a mental state, actual or presumed, in accordance with the maxim, *actus non facit reum, nisi mens sit rea* (Broom, *Maxims*, 7th ed. 249). This is an advance in analysis, for early law treats even such an act as manslaughter by misadventure as a crime.[3]

(4.) A sin is an offence against God; sin is guilt, in the view of a supernatural law. The Lord's Prayer, as given by St. Matthew (vi. 12), describes sins as "debts"—"Et dimitte nobis debita nostra, sicut et nos dimittimus debitoribus nostris." This translates *ὀφειλήματα*; St. Luke (xi. 4) uses *τὰς ἁμαρτίας ἡμῶν*—"peccata nostra"—"our trespasses." *Peccatum* is used by Modestine for *delictum*, when he says, "Ex peccato obligamur, quum in facto quæstionis summa constitit" (L. 8, D. *de O. et A.* (44, 7)): that is in criminal cases.—(*Cf.* Hobbes, *Works*, iii. 278.)

The legal origin of the notion of sin is shown by the definitions. Thus Augustine, as quoted by Scavini (*Theolog. Mor. Univ.* 15th ed. i. sec. 706), says, "Peccatum est dictum vel factum, vel concupitum contra legem æternam," while the author himself adds as the common definition, "Libera legis divinæ violatio." Again the Westminster divines defined sin as "any want of conformity unto or transgression

[1] *Cf.* Bosworth and Toller, *Dict.*, *s.vv.* "Gylt," "Gild." The former occurs in the translation of the Lord's Prayer. See also the German *Schuld*, the Anglo-Saxon *skyld*, and Icelandic *skuld* (p. 146).

[2] Bouvier, *Dict.*, *s.v.* Not Guilty; Sweet, *Dict.*, *s.v.* *Cf.* Pollock and Maitland, ii. 570.

[3] Dareste, &c., *Inscr. jur. grec.* ii. 15: *cf.* Holmes, *The Common Law*, 50, &c.

of the law of God." Are sins spiritual obligations *quasi ex contractu* and *quasi ex delicto ?*

(5.) We may also notice here that the Latin *Pœna* (Greek ποινή) is originally quit-money or a fine, though it was afterwards contrasted with *Multa.* The duty or obligation of the delinquent was to give recompense, and hence the word came to apply to all the inflictions which he had to endure. —(Smith, *Dict. Antiq., s.v.*) The use of the word *solvere,* with its associations of untying and paying, is instructive in this connection.—(Lewis and Short, *s.vv.*; Ihering, *Geist,* i. 277.)

SECT. VIII.—APPEAL TO PUBLIC.

In our discussion of right we saw a claim take the form of making a public disturbance in the custom of obvagulation, sitting dharna or fasting—an attempt to excite public sympathy in favour of a poor creditor against a rich debtor. We may see a corresponding idea in the exposure of a debtor that he might be redeemed by his friends. The Twelve Tables made provision for the debtor who was in prison being brought out and exhibited publicly to the prætor, and the amount of his indebtedness proclaimed (Bruns, 20). Von Ihering has eloquently described the miserable plight of such a debtor who had no friends, and whom no one considered worthy of redemption (*Evolution of the Aryan,* 54). In obvagulation, the poor creditor was the picturesque object of pity; in the procedure subsequent to *manus injectio,* it was the poverty and helplessness of the debtor which appealed to the public. In one aspect the response of the debtor was a claim of right. The poor debtor makes a positive claim to freedom because he cannot pay. He asks mercy, and then public opinion turns round, acknowledges his right to mercy, and enforces the duty of being merciful on the creditor. We see this in a popular form in the story of *The Merchant of Venice,* and in a legal form in the abolition or regulation of imprisonment for debt,

in the Roman and Scottish *cessio bonorum,* in modern bankruptcy laws, and in the American Homestead laws, which reserve to a debtor a certain amount of landed property which his creditors cannot attach (Bouvier, *s.v.* "Homestead").

As corresponding to the idea of claim, we have the phrase "I do not feel called upon" to do something, which means "I do not feel bound or obliged legally or morally." "I do not acknowledge any claim on me" to do so.

"The person using the defamatory words had some *call or duty or lawful interest* to speak or write."—(Ersk. *Prin.* 19th ed. p. 105.)

SECT. IX.—LIABILITY.

(1.) The word "liable" appears to be of English formation. There is no Latin or French term corresponding, although it is understood to be connected with *lier* or *ligare,* to bind. It may be formed from "lie," and mean originally, as the Imperial Dictionary suggests, "lying open to"; but the legal meanings are now well established, and it is not improbable they have been deduced from a false etymology, and the word has thus been filled with meanings analogous to all the Roman ideas of binding in *jus* and obligation —contract—religion—allegiance—lien.

(2.) "Liability" means the potentiality of obligation. It is the extrajudicial aspect of responsibility. As when we speak of a company whose *liability* is unlimited, although it may actually be solvent many times over. So the Companies Act, 1862, says, "The liability of the members . . . may . . . be limited to the amount, if any, unpaid on the shares" (sect. 7). We speak also of the liability of shipowners, and the limitation thereof (Merchant Shipping Act, 1894, Part viii.). So we speak of the liability of a husband for his wife's debts; the liability of a master for his servant—employers' liability. The implication here is that the debt or obligation must, might, or should be established against the wife or servant in the first place.

In all these cases something must occur—the company

must fail, the demand must be made on the husband—before an actual enforceable obligation emerges, but there is a tendency to treat the primary obligation as a merely formal link. Thus in the statement, "the liability of the defenders is to be measured by the law of Scotland," it is the process of measuring which makes the term appropriate.—(*Kendrick*, 1897, 25 R. at p. 86.) In a previous sentence the Lord President says, "The collision having occurred on the high seas, the rights and liabilities of the parties cannot be determined by the *lex loci delicti*."

We may see tautology in the Bankruptcy Act, 1856 (sect. 56), when it speaks of "liability for such debt,"—debt being the object of prestation, and liability the affirmation of obligation. In the Partnership Act "liability" is more general than "obligation" (sects. 9-12 and 24.) In section 41 "debts" are distinguished from "liabilities."

(3.) In some cases, even when we contemplate the actual existence of the obligation, we speak of *liability*, *e.g.*, when we speak of a person who commits a certain offence being liable to or in a penalty, but we may imply that he must be tried, convicted, and sentenced (the precise penalty being defined) before the obligation arises.—(Glasgow Police Act, 1866, sect. 149; Burgh Police Act, 1892, sect. 123.)

When Dr. Broom (*Maxims*, 7th ed. 280) speaks of "property—its rights and liabilities," he is referring to possible obligations which may emerge through certain events or acts of the owner or possessor. In the Bills of Exchange Act, 1882 (sect. 56), we read—"A person . . . incurs the liabilities of an indorser." This means simply obligations, and particularly obligations to pay, as opposed to duties which are in this statute regarded as obligations to act. So Lord Watson, in *Darling* v. *Gray and Sons* (1892, 19 R. (H.L.) p. 33), spoke of "a new right and corresponding liability."

In the following example "liable" is used in the sense of "bound," the word having thus had a history exactly the reverse of "obligatio":—

"To find the defender liable to the pursuers in the expenses of process."—(*Perth General Station Committee* v. *Ross*, 1897, App. Ca. p. 498.)

Here it is the taxation and decerniture that intervene between the finding in question and payment. But we occasionally find it said, "the defender was found liable in (so many) guineas of expenses."

(4.) The term is applied to general obligations apart from money, *e.g.*, "a servant accepting gratuities is liable to dismissal." This is to leave a discretion to the railway company employing him. It is applied to political obligation, or rather obligation of etiquette, in the 37th section of the Victorian Act, given in 18 and 19 Vict. c. 55, which speaks of "officers liable to retire from office on political grounds"—*i.e.*, who are bound to go out of office when their party has ceased to be in a majority in the elected Legislature.—(Anson, *Constn.* ii. 270.)

(5.) We now come to what approaches another physical usage. By accountants and in the balance-sheet appended to the Companies Act, 1862, "liabilities" is used to include possible claims not acknowledged as debts, but loosely it is used simply as debts.

The following case is similar. In Hearn's Draft Code for Victoria (Part xv. sect. 1) he proposed to enact—

"The estate of a deceased person shall be the aggregate of his liabilities and of his rights, including his realty at the time of his death, so far as they are not extinguished by his death."

The same phrase occurs in the 2nd section as to the presumed continuance of liabilities and rights. And section 6 refers to liability "upon any obligation"—obligation here being used in a narrow sense of bond, or contract, or obligation imposed by law. The title of this part of Hearn's Draft Code is "the descent of liabilities," which appears to make them positive things, even in the person of the debtor. There is a similar use of the word "debt."

By the English Bankruptcy Act, 46 and 47 Vict. c. 52, section 37 (8), liability is defined as including—

"Any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the discharge of the debtor, and generally . . . any express or implied engagement, agreement, or undertaking to pay or capable of resulting in the payment of money or money's worth, whether the payment is fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies: as to mode of valuation, capable of being ascertained by fixed rules, or as a matter of opinion."—(*Cf.* definitions in Local Government Acts, p. 161, *supra.*)

In these last examples the liabilities are the debts, obligations, or sums of money which are to be deducted in estimating and forming the *universitas* of an estate (p. 95).

(6.) Things are personified as liable for debts (p. 162).

SECT. X.—GROUND OF OBLIGATION.

(1.) We have already dealt with "cause" as a title. A legal transaction or a wrongful or injurious act may confer a right on one person. We must now observe that it creates a corresponding obligation on another person or group of persons. Thus Gaius (iii. 129):—

"[A re in personam trans]criptio fit veluti si id quod ex emptionis causa aut conductionis aut societatis mihi debeas inde expensum tibi tulero." "There is a transcription from thing to person when, for example, I enter to your debit a sum you already owe me *by reason of* a purchase, a conduction, or a partnership."—(Muirhead, *Gaius*, p. 226.)

It is evident that a contract and a breach of contract cannot create obligations in the same sense. Breach of contract may be a delict, and so in England you may sometimes sue on tort as well as on contract. And in like manner, as we shall see presently, law itself may be regarded as creating obligations in a wider and also in a narrower sense.

(2.) We have seen the idea of right was associated with moral right, rectitude, justice, righteousness. In like manner there is a distinct association of obligation with wrongdoing and unrighteousness. We have already seen that an action

in itself is regarded by Austin and by the Workmen's Compensation Act as a sanction (p. 160, *supra*). In an ordinary Scots summons by which an action is commenced there is a statement that the defender refuses or delays to pay or perform his obligation. By a fiction he must be made a wrongdoer, although the action is a friendly one brought to determine a genuine dispute.

(3.) Mr. Justice Holmes (*Common Law*, p. 79) has shown that the English "law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence," and yet the more popular view is that "a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter." —(*Ibid.* p. 80.) This is only a rude psychology. The person wronged demands reparation, and thinks he will obtain this more easily if he shows that the wrongdoer is a danger to society as well as to the claimant himself. Both parties may have been guilty of acts of violence, and the only means of distinguishing them may be the *animus* of the actor. The claimant was vindicating a right; the wrongdoer was the man who first without cause disturbed the even continuity of social life. The claimant may also argue that the wrong was malicious and might be repeated, because the wrongdoer refuses reparation. If the act were accidental, or if the wrongdoer truly repented, he would be ready to prove this by an offer of all the reparation in his power. With the claimant personal prejudice imputes malice, but law has other reasons for doing the same. Law can deal only with external facts, and it saves trouble to presume malice when injury has been done and you wish to compel reparation. *Res ipsa loquitur*.[1] So the British Legislature in 1880 passed an Employers' Liability Act, in which they made the employer responsible for the negligence of foremen and others. By a fiction the employer was made a wrongdoer. The true

[1] Pollock and Maitland, ii. 473 *seq.*

reason was that as a matter of public policy it was thought expedient that the contract of hiring should involve an implied term of insurance by the master against certain accidents to the servant. This is the general principle of the Workmen's Compensation Acts, 1897 and 1900, though there may be some expressions inconsistent with this new idea.

(4.) As in the question of right we saw law was disposed to discuss title, the external visible evidence, so in obligation the demand is "Show me the bond." The defender, debtor, accused is presumed free or innocent. Unless he is clearly bound he goes free. Hence law thrusts aside understandings, anticipations, and vague feelings, and demands solemn ceremonies, written evidence, or something equivalent.

This accounts for the identification of obligation with the written evidence thereof, as rights mean title-deeds,—an apparently inevitable physical usage. Blackstone says:—

"An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another on a day appointed."—(ii. 340.)

The word does not appear in this sense in the Stamp Act of 1891, but the use of obligation for bond is common. It occurs in the Code (iv. 30, 7). It is also used in modern French. It is so used in Scots law so far back as Balfour of Pittendreich's time.[1]

(5.) We have already seen that the recognition of the State makes rights effective (p. 124), and that in like manner the public force may be regarded as making obligations effective. In popular usage laws are spoken of as binding and as creating obligations. Law has even been defined as a command by a sovereign binding his subjects. It is sufficient to notice here that law may be a ground of obligation (1) by recognising and enforcing private obligations, as in enforcing contracts and trusts; and (2) by creating and

[1] *Practicks*, 149; Ross' *Lectures*, i. 31.

enforcing public obligations such as of allegiance, the fulfilment of public services as jurymen, witnesses, constables, soldiers, labourers (the corvée), and the payment of taxes. Law in this connection is used in two distinct senses. It is either the general recognition and enforcement of obligations by society or it is in addition a particular cause of obligation or a title to rights.[1]

SECT. XI.—POWER AND DUTY.

"May" we saw expressed a right in the form of a "power" (p. 65). In like manner "shall" imports an obligation. It is a pure statement of fact plus the feeling of "ought," "must," or "obligation" or "cause." "Shall" is said to mean "I owe: I am under an obligation," and finally, "I have offended," and "I am under a penalty."—(Skeat, *Dict. s.v.*) The feeling referred to is the general one of the members of society or the State, as well as of the individual, and always is translated into some physical form.

In the Board of Trade Bye-laws of Railways we find liabilities imposed in the future tense with "will," *e.g.*, "the passenger will be required to pay the difference." This evidently assumes that "shall" is only a future tense.[2] It puts the obligation as a statement of fact. Perhaps the change of word is to mitigate the harshness of the penal character of the payment. It presumes the innocence of the traveller, and that he undertook to pay when he entered the train. It takes for granted power and will to pay, though there is an implied obligation in the background, *i.e.*, the penalties of the law courts.

"May" apparently confers a right or a jurisdiction, and in so doing imposes at the same time an obligation on the person vested with the right to exercise the same. "Shall have power" is subject to the same observation. "Shall if

[1] It is so used by Gaius and Modestine, Ll. 1 et 52, D. *de O. et A.* (44, 7).

[2] See the translation of the Decalogue (Exodus xx.) in the Greek and the Latin Vulgate.

they think fit" imposes an obligation, and in so doing raises a right sometimes absolute in the person for whose benefit the power is given. "It shall be lawful" comprises both sides, and adds the recognition of the State or society.

The case of *Julius* v. *Lord Bishop of Oxford*, 1880, L.R. 5, App. Ca. 214, contains many valuable *dicta* illustrating this topic :—

> "Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.' . . . If the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him so to do. And this is equally the case where the power is given by the word 'may,' if the object be clear."—(Lord Blackburn, p. 243.)

This case illustrates the ideas of power, jurisdiction, obligation, and duty in courts of law, and also proves how wide is the legal application of the idea of "right." It is a weighty authority in support of the criticism given of Bentham's view of power in the last chapter (p. 67, *supra*).

SECT. XII.—DUTY AND INTEREST.

We have already dealt with interest as the object of a right. It may also apply to the prestation in an obligation, but this usage is not legal, for interests can always be translated into rights. The interest of a defender is a right vested in him. An artist who contracts to carve a statue in marble, a shoemaker undertaking to make a pair of shoes, a porter hired to carry a burden, are all *interested* in a peculiar form in the object of their respective contracts, and in their own acts constituting part thereof. Their interest is necessarily different from that of the creditor.

Duty and interest are frequently associated by Gibbon in his History. The reference here is to a motive for an act or a course of conduct. Duty implies some higher motive than personal interest; whereas interest may imply personal, selfish motive. A duty might be merely a burden; while an

interest might invest the duty with the aspect of a right. Some moralists seem to think duties ought to be disagreeable: if the acts become pleasant, the presumption is that they are wrong. So in law duties are often regarded as burdens, and rights as privileges.

We have already seen the idea of interest associated with the motive for the exercise of a right.[1] It may also be the motive for the performance of an obligation. If the obligation is lawful and lawfully performed, a malicious intention on the part of the debtor will not make it unlawful.

There are two instances in which the law connects duty and interest,—one of these is the case of a judge, the other that of a witness. A judge is *interested* in his work, but his interest ought to be professional or scientific. If he is interested pecuniarily or materially in a case, he must decline to pronounce a judgment (Mackay, *Practice*, i. 95). His proper interest is to do justice, and this coincides with his duty. Any other interest is corrupt and unlawful.

Again, a witness is bound to give evidence and to tell the truth, but "interest" formerly disqualified him, and now may lay his testimony open to suspicion. His proper interest is to promote the ends of justice, and this coincides with his duty (Green, *Encycl. of Scots Law*, *s.v.* Interest; Best on *Evidence*, 8th ed., 178–180).

Again, interest may be regarded as a debt. This usage has already been referred to from the side of right (p. 82).

Obligations may be classified according to the interests involved; but this subject will be dealt with later (p. 190).

We may also notice, as we did with rights, the impossibility of transferring obligations (p. 120). This depends on what we regard as the interest transferred, for every person connected with a transaction has necessarily a different interest. If it is such a prestation as payment of a definite sum of money, the obligation for practical purposes is transferable. In the Roman law and in Scots law novation and

[1] P. 91, *supra*; 14 *Jur. Rev.* 326.

delegation—modes of transferring obligations—are treated as modes of discharging prior obligations. That is to say, instead of treating the transaction as a transfer, the obligation is discharged and a new one created. In English law it is only recently that such transfers were recognised.[1]

And, again, we may have collisions of obligations as we have collisions of rights. In law these are dealt with as collisions of rights,—for example, in bankruptcy. Casuistry attempts to deal with collisions of duties by marshalling them in order of importance, *i.e.*, according to social interests.

SECT. XIII.—SERVICE.

(1.) "Service" is the prestation of a *servus*, a slave. It is frequently used in the same sense as "office," as in ecclesiastical usage,—*Divine Service.* These meanings are post-classical. The Latin word "servitium" meant (1) the condition of a slave—slavery; and (2) a body of servants, a usage which is still maintained in such phrases as "The Civil Service," "The Medical Service," &c.

(2.) In Roman law it was applied to the mutual relations of lands, buildings, &c. in *servitudes.*

(3.) Feudal usage applied the term to the homage or obligation due by a vassal to his lord.[2] An interesting account is given by Britton (iii. 4) of the ceremony of homage and of the means of compelling the liege lord to accept, or the vassal to do, homage. Craig (*Jus Feudale*, ii. 17, 33) applies the term to all prestations due by a vassal, feu-duty (*canon*), or any other return.

(4.) The word "service" is applied in England to what in Scotland is called the "execution" of a writ by an officer of Court.[3] The usage is common also in Scotland, and is recognised by Stair (iv. 3, 5). It is an example of ironical polite-

[1] Muirhead, *Gaius*, p. 550, &c.; Bell, *Prin.* 576-579; Holland, *Jur.* 295, 301.

[2] *Lib. Feud.* ii. 23, 1; 24, 6; 26, 17; 36; 37, 1, &c.

[3] Court of Session Act, 1850, s. 20, Sch. B.

ness; the person on whom service is made is treated as the master.

(5.) The "service" of heirs to their ancestor, as still followed in Scotland, combines two usages. This process down to 1847 proceeded on a brieve from Chancery in Scotland. A brieve was a writ issued in the King's name directing and commanding a judge to do justice, or give redress to the person who obtained the writ. The obedience to this "chargo" and command was "service." Balfour in his *Practicks* (pp. 418-441) speaks constantly of the "serving of a brieve," meaning thereby the process by which the remedy was carried out. Stair (iv. 3, 15), in the course of his exposition of this subject, says, "All these brieves must be served with inquests, and so cannot be served before the Lords in the first instance." Brieves were common for many purposes in the older law of Scotland. There were brieves of idiotrie, brieves of perambulation, brieves of lyne or lineation, brieves of division, brieves of richt, but the most common was the brieve of mortancestrie or inquest. It is this last which is represented to some extent in modern "service" as heir. This mode of procedure was borrowed from England, as we see from the treatise *Quoniam Attachiamenta*, but fell into desuetude upon the institution of the College of Justice in 1532 (Mackay, *Practice*, i. 268). It is still represented in England by the system of writs for the commencement of actions at law.[1] The procedure in a Scottish "service" was in certain cases before the Sheriff of a county, and in other cases before the Sheriff of Edinburgh, assisted by a jury.[2] The question put to each of the jurors was "Serve or not?"[3] and by their verdict they "served" the person as heir. This when returned to Chancery was "service of the brieve" in Balfour's sense. But the word occurred in the brieve also in the sense of feudal service or homage. One of the heads of inquest was "per quod servitium

[1] Stephen's *Comm.* iii. Dr. Cowel (*Institutes*, iv. 6) says that brieves were often confounded with actions.

[2] Jur. Styles, 3rd ed. i. 368, &c.

[3] *Ibid.* p. 377.

tenentur [*sc.* terræ]."[1] This question was specifically answered in the verdict, and this occurrence of the word may have tended to keep it in common use as applied to the process. When a person "serves himself heir," it may be thought that the act is formal homage, which entitles him to enter on his inheritance.

(6.) "Service" as now used in Scottish conveyancing procedure is a form of action for the establishment of the character of heir. It is a right, and is commonly used also as describing the document which evidences the right. A service is a title to land, and if the lands are described in it, as is done in "a special service," the document is treated as a formal conveyance from the dead ancestor to his heir.[2]

(7.) It is still competent in Scotland to speak of "serving" tutors-at-law to minors or idiots (Bell, *Prin.* 2079, 2103), or of "serving a widow to her terce of lands" (*ibid.* 1601). This is an example of the confusion of right and action. If a person claiming a right holds a brieve which can only be challenged by some peremptory objection, the formal recognition of this right is spoken of as service of him thereto.[3]

(8.) The phrase "I am at your service" may possibly regard "service" as the right of the employer, rather than the obligation of the speaker.

SECT. XIV.—*OFFICIUM*—OFFICE—*MUNUS.*

(1.) Officium means primarily an actual prestation—something *de facto* done. Then abstractly it means the doing—doing successfully or doing right (*κατόρθωμα*).

Then it comes to mean what one ought to do or is bound to do, *i.e.*, duty (Cicero, *De Officiis*).[4] Office (duty) on the mental side finds expression in external offices (duties). Lewis and Short (*s.v.*) define it as "a voluntary service, a kindness, favour, courtesy, rendered to one whose claim to it

[1] Stair, iv. 3, 5.
[2] Bell, *Prin.* 779, 1824. Titles to Land Consolidation Act, 1868, s. 46.
[3] Stair, i. 6, 25; ii. 6, 13.
[4] Grant's *Aristotle*, 3rd ed. i. 324

is recognised, while *beneficium* (p. 108, *supra*) is a service rendered where there is no claim." This follows the distinction drawn by Seneca (*De Beneficiis*, iii. 18), who adds *ministerium* as the compulsory prestation of a slave. The use of the word "service" will be noted, as it carries back the metaphor to slavery, which we have seen is the connecting link of all the ideas of obligation.

(2.) Like the word service, office has long had ecclesiastical associations; prayers are dues to or for the dead, or to the Deity—the offices of the Church (*Const. Clement.* iii. 14).

(3.) It is also used in a moral sense in the phrase "kind offices," and in a bad sense in the word "officious."

(4.) And, finally, "officium" comes back to physical meanings. A man's office is the source of his duties. The office of Secretary of State, for example, implies duties. It is applied to returns and dues, offerings, revenue (Ducange). It was also applied to a body of officials—persons vested with "official" rights and duties (Lewis and Short, Ducange), as when we speak of "The Home Office," &c.

And thus it even comes to mean the building in which duties are performed. This usage is as old as Pliny, but is common in the Scots Entail Acts and certain revenue statutes.—(Dowell's *House Tax Acts.*) Offices of a mansion-house are the buildings where servants perform their duties.

(5.) In "the insolence of office" the ideas of service and duty have disappeared. The rights involved, which were necessary to enable the holder to perform his duties, have become paramount, and are exaggerated into wrongs in an active form. Blackstone says that—

> "Offices, which are a *right* to exercise a public or a private employment, and to take the fees and emoluments thereto belonging, are also incorporeal hereditaments."—(ii. 36; *cf.* Bell, *Comm.* i. 121.)

A man, he says, may have an estate in them. This illustrates the proposition which we discussed at an earlier stage, that the same legal relation may be from one point of view a right, from another an obligation. Many persons regard an

office as a title to a salary, and not as imposing any serious public duties whatever. We have already noticed the change of meaning in the words "officer" and "minister" (p. 150).

(6.) The Latin *munus* is closely associated with *officium*, and passes through similar changes of meaning. If the ordinary derivation is correct, it has its origin in the concrete burden of repairing or defending the city walls (*mœnia*). Festus says, "Munus significat officium, cum dicitur quis munere fungi: item donum, quod officii causa datur.—(Bruns, 345.) The title of the Digest *De muneribus et honoribus* (50, 4) amply illustrates the connection of burdens and official rights. Cicero joins the words when he says:—

"Multi ita sunt imbecilli senes, ut nullum officii aut omnino vitæ munus exsequi possint."—(De Sen. 35.)

(7.) In modern usage *munus* is applied to public offices. These are discussed as rights in the case of *Hastie*, 1889, 16 R. at p. 733. But a *munus publicum* involves official duties, as in the case of clergymen, registrars, returning officers in elections, common carriers, and others (Green's *Encycl. s.v.*).

SECT. XV.—DEBT—DUTY—TO OWE—OUGHT.

(1.) Debt has a physical reference; *debibere, debere*, is to withhold a thing in point of fact. Then if we go behind the mere fact, we find a man withholding against the owner's wish, or unlawfully; that is, when he *owes* something, and *ought* to pay. "Debitor" is a person who can be compelled to fulfil an obligation—applied first to loans and then extended to other obligations.—(Hunter, *Roman Law*, 3rd ed. 454; L. 108 D. *de V. S.* (50, 16); L. 66 D. *de R. J.* (50, 17).)

(2.) The confusion between owing a definite thing and a sum of money is referred to by Pollock and Maitland (p. 139, *supra*). A debt is conceived as consisting of definite coins.

(3.) The debt becomes a thing—a sum of money— an incorporeal thing. So the English Mercantile Law Amendment Act (19 and 20 Vict. c. 97, sect. 5) speaks of paying "a debt,"

i.e., paying a sum of money, so as to discharge a debt. We may have real debts affecting land, and personal debts exigible from a person's estate generally. These are due to private creditors; but when they are payments to feudal superiors or to the Crown they become *duties*; or to the church or law courts, they are *dues*. *Duties* may be sued for as *debts* due to the Crown.—(Taxes Management Act, 1880, sect. 111 (1); *cf.* the use of "Liability," p. 167, *supra*.)

Debts, duties, and dues may all be regarded as rights—or objects of right, as when a person collects debts, &c. So English law speaks of an "action of debt," which is the proper remedy for non-payment (Blackstone, iii. 154), and in 1867 Parliament passed the "Debts Recovery (Scotland) Act," which in section 2 uses the same phrase.[1]

(4.) Duty comes from the same root through Norman-French (though the word does not occur in Continental French). According to Murray the earliest English usage is conduct or action to a superior—homage, and then feudal prestations. And then it means the obligation underlying a course of such prestations—an office: "the duty of a constable;" "the duty of fencing machinery;" "an obligation of duty."[2]—(*Heaven* v. *Pender*, p. 196, *infra*; Glasgow Police Act, 1866, sect. 93.) And then it may mean general, legal, or moral obligations.

It may also mean a single act of such general duty,—*e.g.*, "perform a duty" (19 and 20 Vict. c. 97, sect. 5). "*A* duty imposed by our obligations" is the phrase used by President M'Kinley on 6th December 1897 in his Message to Congress. We might almost have anticipated "an obligation imposed by our duties," but obligation implies rather a legal bond which might not be disregarded—a perfect obligation, giving rise to a relation at once legal and moral. Perhaps he meant treaties and written declarations. In the Bills of Exchange Act, sect. 39, and following, the rubric contains the words, "general duties of the holder." Duties appear to be obliga-

[1] *Cf.* 1 Vict. c. 41, The Small Debt Act. [2] *Cf.* "Officii munus" (p. 178).

tions *to act*, as compared with liabilities, which we have already suggested are obligations to pay (sects. 53-58). So in the Burgh Police (Scotland) Act, 1892, sect. 55 and following sections deal with "Powers and duties of Commissioners," —"official" rights which are necessary to enable them to perform their official duties. Under section 79 the constables make a declaration that they will faithfully discharge "the duties of the office."

And, finally, it is used for the special payments from land called "feu-duties," or taxes on transactions (stamp duties), or taxes on goods, which are known as "duties," as others are called "customs" or "rectum" (Stamp Act, 1891; Taxes Management Act, 1880; Bell, *Comm.* ii. 19-20, deals with *bonds* for the King's *duties*).

(5.) The words "owe" and "ought" have been incidentally mentioned. They are derived from the Anglo-Saxon *agan*, "to own, to possess," and belong to the same group as the English "own," Scots "ain," German "eigen" (Eigenthum, property).—(Bosworth and Toller, *s.v.*)

The original meaning of "owe" is "to own or possess":—

> "This is no mortal business, nor no sound
> That the earth owes."
>
> (Shakespere, *Tempest*, I. ii. 407.)

If you "owe" with the *animus domini*, you "own." The thing is your own—your property (proprium). If you "owe" —possess—a thing for another or against his will, then you "owe" it to him in a new sense. The Anglo-Saxon word was also used in an active sense—"to make another own or possess —to give, deliver, or restore,"—the association of ideas is the same as in *debibere*, *detinere*, and no doubt regarded specific things before being applied to debt in general. The word thus appears to translate exactly the Latin *debere*.

Then the past tense "ought," which retains, but in spelling only, the "g" of the Anglo-Saxon and modern German, is now applied generally to moral and legal obligations and duties. The conclusion of a Scots summons is that the de-

fender "*ought and should* be decerned and ordained" to pay, &c. These words here are merely auxiliaries with a meaning half ethical and half grammatical, or they may refer to the duty of the Court, while the actual binding force of the law on the defender is projected into the words "decerned and ordained" (p. 314, *infra*).[1]

SECT. XVI.—BURDEN.

(1.) "Burden," in legal usage, is synonymous with "debt," "duty," and "obligation." This application is evidently taken from the simile of a load placed on a person's back or shoulder (*cf.* p. 146, *supra*). The prestation of a slave, who is a mere beast of burden, or of a free hired porter, is the service of carrying.

(2.) The Latin word *onus* is frequently used in this way, and very numerous examples are given by Brissonius (*s.v.*). It was applied to servitudes, taxes, legacies, and debts of all kinds. "Pondus" is also used in Justinian's collections (Brissonius, *s.v.*). "Burden" is then transferred to duties or debts in general. Thus Erskine (*Inst.* i. 6, 56), in discussing the *duties* of a father to his children, speaks indifferently of his being *bound* or *obliged* to maintain them, or of the *burden* falling on him.

(3.) The phrase "burden of proof" refers to the obligation of a party to prove his averments as a condition of his succeeding in his action.[2] The person on whom such burden is imposed is generally *bound* to lead. This obligation is a corollary from the right of the accused or of the defendant to his personal right of freedom or immunity from attack. It becomes a special obligation when the prosecution fails, and the prosecutor is fined for his false accusation, as in old

[1] *Cf.* the Latin *tenere* to possess, and *teneri* to be bound: these point to slavery. The Anglo-Saxon and English words regard the possession as a *causa debendi* (pp. 76, 94, 140, and 170, *supra*).

[2] Indian Evidence Act, sect. 101, Stokes, ii. 909.

English procedure.[1] The burden of proof must be distinguished from the obligation to prosecute, when in English procedure a prosecutor is bound over to prosecute (Stephen, *Dig. of Crim. Procedure*, Art. 194).

(4.) When a person conveys property in mortgage or pledge we extend the idea from the person to the subjects which he conveys in security, and we speak of an estate being burdened with debt (p. 144, *supra*). So we read—

"Creditor *prædia* sibi *obligata*, ex causa pignoris locare recte poterit."—L. 23 D. *de pig. et hyp.*, &c. (20, 1).

"It is leasum to ony man to bind or obliss his gudis and gear."—(Balfour, *Practicks*, 150).

In the case of *Dowager Duchess of Montrose* v. *Stuart*, 1887, 13 A.C. 81 (at p. 87), the phrase "real burden" is used as opposed to "personal obligation"—as meaning a debt exigible from "real" estate as opposed to "personal" estate —moveables.

(5.) The phrase "real burden" is also used in a technical sense in Scots law as applying to

"An inherent condition of the feudal right, running with the land, [which] may be enforced by personal action against the vassal for the time being by the party or parties for whose benefit it is imposed."

"To constitute a real burden or condition either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone."—(Bell, *Prin.* 10th ed. 861.)

It is in truth an obligation which runs with the land, and for the enforcement of which the creditor has a right to proceed against the land and the moveable property thereon, and the rents payable therefrom. The proprietor for the time being is obligant if there is a person with an interest to enforce it. The *reality* of the obligation is still more apparent if the obligant is not bound beyond the value of the subjects. It is unnecessary here to deal with the legal

[1] Pollock and Maitland, ii. 517; *cf.* Stair, iv. 39, 4, "the burden or benefit of probation." See p. 117, *supra*. As to the rights of a litigant see Darroch *v.* Kerr, 1901, 4 F. 396; 14 *Jur. Rev.* 323.

formalities required to make the right real, to affect remote successors and third parties; and also with the question whether it applies to stipulations, other than money ones. If this last point be doubtful, legislation may be required to declare the law, for certainly the public convenience requires that stipulations as to building and maintaining buildings should continue enforceable for an indefinite period.[1] Scots law distinguishes between a real burden as here explained, and a personal obligation binding the owner for the time being of certain subjects.—(*Magistrates of Arbroath* v. *Dickson*, 1872, 10 M. 630.) Ownership is here the cause of obligation (title).

(6.) A servitude may be regarded as a concrete obligation which goes with land. It applies to any owner of the land. It may be a real right as well as a real burden, as in the case of a right of way. It may go with certain lands as a pertinent, like the right of stillicide. We may also see a perpetuation of the original idea of burden or slavery in the servitude "oneris ferendi," where one house leans on another, like a master on a slave.

"Servitudes on land are rights of a definite and known description, whether as burdens on the debtor's property or as privileges augmenting its value."—(Bell, *Comm.* i. 19; Code Civil Français, 637, 638, where the word used is "une charge,"—see next section.)

(7.) Real burdens are regarded as "estates in land."[2] So it is said also personal servitudes are truly limited estates.—(Austin, 853.) And Bell, under the title of "estates by reserved burden," says—(*Comm.* i. 39):—

"The fee may be burdened with a sum to be paid to the granter, or with an annuity to be paid to him periodically, or with a sum payable to a third party. This is called burden by reservation or real burden. . . . [The creditor] has a real right which his creditors may attach."

(8.) "Burdens" is loosely applied to all payments due by

[1] *Cf.* Marshall's Tr. *v.* M'Neill, 1888, 15 R. 762; and Cowie *v.* Muirden, 1893, A.C. 674.

[2] Conveyancing Act, 1874, sect. 3.

a proprietor of lands as such—*e.g.*, feu-duties, ground-annuals, and "public" burdens, which are described as "taxes" and "rates," when regarded from the side of law.[1] These last words imply regulation and proportion. In the formula of conveyances "with and under the real burdens, conditions, &c." "burdens" probably refers to pecuniary obligations,[2] and the other words are an attempt to raise other obligations to the same level of reality.

SECT. XVII.—CHARGE—LIEN.

(1.) The word "charge" in Scots, English, and French involves the same metaphor as "burden." It is connected with "cargo," and the English and French words relating to the loading of ships. We speak of a charge when we load a gun.—(Skeat, Murray, *s.v.*)

(2.) In Scots legal language a charge is an order or command to a person to perform some legal act: examples occur in the translation of *Quoniam Attachiamenta* (chaps. 49, 50, &c.), where the common formula runs in the name of the King:—

"To our justiciar, schiref, provost, and baillies, &c.—We command and *charge* you, &c."

So also in the common form of summons, which begins an action in the Scottish Court of Session, we find the writ concludes thus:—

"Our will is herefore, and we *charge* you that on sight hereof ye pass and in our name and authority lawfully summon, warn, and *charge* the said defender, &c."—(Mackay, *Practice*, i. 375.)

The former "charge" refers to the official duty of the messenger-at-arms, the latter to the duty of the defender to compear. With this may be compared the ordinary form in actions of interdict which asks the Court "to interdict, prohibit, and discharge" the respondent from doing something.

[1] Bell, *Lectures*, i. 641.

[2] See Menzies, *Lectures* (Sturrock's ed.), 579; Bell, *Lectures*, i. 615; Conveyancing (Scotland) Act, 1874, sect. 32, Sch. H.

—(*Juridical Styles*, iii. 458.) But the ordinary usage is to apply "charge" to the written order executed or served by an officer of court, calling upon a debtor or obligant to pay a sum or perform an obligation therein specified.—(40 and 41 Vict. c. 40, sect. 3; Graham Stewart, *Diligence*, p. 290.) The charge makes the burden of debt more onerous, for on the expiry of a certain number of days the creditor may proceed to attach the debtor's property, and in certain cases imprison the debtor himself.

(3.) The common English usage of "charge" in regard to crime,[1] illustrates the close connection between the position of an ordinary civil debtor and a person who is alleged to have committed a crime. The mere accusation is a burden. As Sir J. F. Stephen remarks (*Hist.* i. 254, 274), the assertion in the indictment by the grand jury went a long way to the conviction of the accused. Perhaps the practice of loading prisoners with chains, according to the "gravity" of their offence kept before men's eyes the closeness of the metaphor. But it is very ancient. The Psalmist affirms of his "iniquities," "as an heavy burden they are too heavy for me" (Ps. 38, 4). This appears to be the text of Scripture which suggested directly the burden on the back of John Bunyan's Pilgrim. The metaphor is that of laying something on one—laying to one's charge. So Bracton (143*b*) uses the phrase "crimen imponi"—which is certainly not classical. And Britton, while he speaks of the royal duty as *noster charge* (i. 1, 1; *cf.* i. 17, 2), and speaks of jurors being "chargez de quel fet il deyvent dire verité" (i. 5, 9; *cf.* iii. 4, 15), does not call accusations "charges," but uses the phrase "sicum le apelour ly met sour" (i. 23, 7, and 10). Between the date of Britton (Edward I.), and that of the English Bible (James I.), the word has become recognised as meaning an accusation, but it does not appear as a technical term in indictments. In the record of an indictment and conviction of murder (*temp.*

[1] It is also French, see *Code d'instruction criminelle*, Arts. 231, 247, 248; *cf.* 16, 22, &c.

2 George III.) given by Blackstone (IV. App. i.), the narrative and conviction give the phrase "charged *upon* him." The use of this word indicates a change of view and a growth of humanity. Instead of looking at the act from the point of view of the pursuer or accuser as a crime, it regards it from the standpoint of the accused as a load—a burden from which he had to clear himself.

We may connect this with the Anglo-Saxon *Lād*,[1] which meant an excuse or defence against a charge, and particularly the purgation by ordeal. In the simple lād, the iron weighed one pound, and it increased in weight with the gravity of the offence, till in the threefold *lād* it weighed three pounds.

In later times the idea might only be the passing on of the "charge" of the great assize or of the grand jury to the culprit. As the executioner would hereafter "do his duty," so did the jury fulfil their "charge" by charging the prisoner. This double association of the word "charge" is like that noticed in connection with the word "service" (p. 174, *supra*).

The word "charge" has now become technical in the Army Act (sect. 45, &c.) and the Rules of Procedure thereunder (9 B.), where "a charge" is defined as "an accusation contained in a charge-sheet that a person amenable to military law has been guilty of an offence."—(*Manual of Military Law.*) The same term appears in the Indian Code of Criminal Procedure (Whitely Stokes, *Anglo-Indian Codes*, ii. 358).

(4.) In Scotland the history of the word in this sense is shorter. It is not used by Sir George Mackenzie, who yet speaks of the defender being "burdened with more than one defence at once" (Works, folio ed. ii. 226); it occurs on every page of Hume's *Commentaries;* but it does not appear as a technical term in indictments. This application was made in schedule A. of the Criminal Procedure (Scotland)

[1] This word is represented in English by "load," and is connected with the verb "lead," and the German "laden," "Last," &c. See Thorpe's *Ancient Laws of England*, Glossary and Index, *s.v.* "Lād"; Bosworth and Toller, *Anglo-Saxon Dict.*, *s.vv.* "Lād," "Lādian," &c.; Ducange, *s.v.* "Lada"; Grimm's *W. Buch*, *s.v.* "Last."

Act, 1887, where the noun "charge" is used instead of the verb, which is used in the forms given under the Army Act and the Indian Code.

(5.) In French usage, "charge" may refer to official duties, public taxes, or personal obligations by an heir and other persons (Merlin, *s.v.*).

(6.) In English and French usage a charge may be a burden on property:[1]—

"Hypothèques et autres *charges* réelles" (Code Civil, art., 958)—

"[Succession] duty shall be a *charge* on the property" (Finance Act, 1894, sect. 18 (1); *cf.* sect. 20 (2).)

"The expression" incumbrances "includes mortgages and terminable *charges*" (*Ib.* sect. 22 (*k*).)

The following section (23 (10)), applying the Act to Scotland, defines "incumbrance" as including

"Any heritable security or other debt or payment secured upon heritage."

"The word "charge" runs through all the Scots Acts amending the law of entail; while it does not occur in this sense in the Conveyancing Acts.[2] Thus an heir of entail may on certain conditions "*charge* with debts or incumbrances" the entailed estate.—(Rutherfurd Act, 11 and 12 Vict. c. 36, sects. 4, 18, 25; *cf.* 45 and 46 Vict. c. 53, sects. 4, &c.) So 38 and 39 Vict. c. 61, sect. 8, speaks of *charging* "the fee and rents of such estate," while 10 Geo. III. c. 51, sect. 13, speaks of a "charge against succeeding heirs." It will be noticed that in some cases the charge is by force of law; in other cases it is judicial; and in others again extrajudicial.

(7.) A charge by a judge to a jury, or by a bishop to his clergy, lays down the duties which they ought to perform.

[1] Comyn, *Digest*, Chancery, Appendix; Seton's *Judgments and Orders*, *s.vv.* "charge," "charging order": Reports des Cases, argue et adjudge in le temps del' Roy Edward le Second, pp. 213, 214, 505: Merlin, *Rép. de Jur. s.v.*

[2] "Burden" appears to be Scots for the English "charge." Compare the speeches of the Lord Chancellor and Lord Watson in *Duchess of Montrose*, 13 A.C. 85. *Cf.* Bell, *Prin.* 979, and *Code Civil*, 637.

The phrase will be found in Britton, as already quoted (p. 185); and also in the Years-books of 20 and 21 Edward I. (Horwood's edn., Rolls Ser., p. 21; *cf.* 21 Edward I. (1293), p. 277; Reports, 17 Edward II. (*cit. supra*), p. 505.)

(8.) The word occurs in the general sense of "duty" in all the speeches delivered at the opening of the New Law Courts in London in 1882.—(10 Q.B.D. 1.)

(9.) The charge becomes identified with the prestation, as when we speak of "legal charges"—*i.e.*, lawyers' fees. The word occurs frequently in this sense in the Acts of Sederunt passed by the Court of Session to regulate fees. In an account of charge and discharge, the charge is a collection of debts and liabilities; the discharge is a collection of credits.

(10.) In popular usage a thing intrusted to a person may be described as "a charge." We speak of a ministerial charge—a benefice. The writ giving a charge is in Scots practice itself called a charge (1 and 2 Vict. c. 114, schedules Nos. 4 and 8); and "charge" may also be applied to such a document as an indictment (see Whitely Stokes, *Indian Codes*, ii. 358).

(11.) A charge may be regarded as a right, as in the following example:—

> "It shall be lawful for the Court . . . to declare such law agent entitled to a *charge* upon and against, and a right to payment out of the property . . . which shall have been recovered," &c. (54 and 55 Vict. c. 30, sect. 6.)

This provision, following the English law of 23 and 24 Vict. c. 127, sect. 28, and the Irish one of 39 and 40 Vict. c. 44, sect. 3, assimilates the right given to one of lien over papers and titles.—(Bell, *Prin.*, 1388, 1438.) The usual definition of a *lien* is a *charge*.

(12.) The idea is embodied in a person—an officer—in a *chargé d'affaires*, who temporarily performs the duties of an ambassador, without enjoying all his privileges. This seems to be a particular example of a more general French usage (Merlin, *s.v.*).

(13.) Lien is often associated with charge, but its use is more technical. The French word *lien* is applied to the chains of a slave or prisoner (Britton, i. 6, 2); the ties of blood; or the bonds of matrimony—personal relations alone (Littré, *s.v.*). We read in Britton:—

"Obligacioun est lyen de dreit dunt acun est lié a doner ou a fere acune chose, et si est mere de play," &c. (i. 29, 2).

"Homage est un lyen de dreit" (iii. 4, 1).

Here the word is used to translate the Latin *vinculum juris.*

(14.) Apparently "lien" refers originally to the binding or tying of the property of a debtor, and is described in all the books as *a right*; and, further, as a right affecting things. (Stroud, *Dict.*, *s.v.*; *Holmes* v. *Tatton*, 24 L.J.Q.B. at p. 351; Bouvier, *s.v.*) The reason may be that the word was adopted in this meaning along with the doctrine—spurious French, like Lord Brougham's "Collaborateur." The word is only a recent importation into Scotland, for such rights as it indicates were described by Stair and Erskine as "a right of retention" or "a hypothec."[1] There is no such title in Morison's *Dictionary of Decisions.* The word was popularised in Scotland by George Joseph Bell, but the Sale of Goods Act, 1893, sect. 62, translates it for the benefit of Scotsmen by "right of retention."

SECT. XVIII.—CANON—KAIN.

(1.) The word canon, in the sense of law, will be dealt with later. Canon means a measure, and hence a rule—a law. In Justinian's Code it is applied to legal payments of tribute and grain, public *burdens.*—(x. 23; xi. 22, 3; and 23.) In the second of these texts, "Neminem patimur in mutando canone urbis Romæ, nostræ clementiæ beneficium postulare," it means the amount of tax paid.—(Smith, *Dict. Ant.*, *s.v.*, i. 356).

[1] *Cf.* the English and the French version of the Japanese Civil Code as to hypothecs.

(2.) In Scots law it is extended to private payments under a feu-charter—(Craig, *Jus Feudale*, ii. 3, 34)—"Semper aliquis canon certus constituitur;" and the process of irritancy for non-payment of feu-*duty* is known in practice under the name of "declarator of irritancy *ob non solutum canonem*."—(Conveyancing Act, 1874, sect. 4 (3).) This usage is mediæval.—(See Ducange, *s.v.*)

(3.) In old Scots law the word canon is corrupted into kain, being borrowed from the Gaelic. Dallas, *Styles*, ii. 343, 345, gives "kains, customs, casualties, &c.," but here it refers to the rights which accompany the transference of a benefice. The word still survives in the phrase "kain fowl." This is a prestation—a due—a duty, but paid according to law, and hence it is called "kain" fowl, *i.e.*, a fowl given *secundum canonem*.—(Ross' *Lect.* ii. 495.)

SECT. XIX.—CLASSIFICATION OF OBLIGATIONS.

(1.) The question is sometimes discussed whether rights or obligations should be made the basis of the classification of legal relations. In the view explained above of the absolute correspondence of rights and duties, it may be thought that the question should disappear. But this is not so. Rights are classified according to interests—the matter of rights—the ends aimed at by the subjects claiming the rights. So we may classify obligations according to the interests—the ends and aims of the debtor—the subject of the obligations. For some purposes law may treat the interest of all parties as identical, as, for example, in the transfer by sale of a thing. But even in the simplest case the real interests of the parties are divergent; and it is only by a fiction and sometimes only by sheer force that they can be identified. For broad general classes—public, private rights—rights of person, freedom and liberty, rights over things, the family, &c., we can hardly do otherwise than adopt the creditor's standpoint of claim, but when we come to definite rights which must be

embodied in a decree, implying obligations in a narrower technical sense, it would be unsatisfactory to enumerate the wide general *duties* of the debtor, corresponding to the wide rights of the creditor, and so law books naturally specify the precise points in which the freedom and the rights of the debtor are limited. It is a matter of convenience. Rights from the creditor's standpoint tend to become unlimited. To become legal they must become precise and definite. The necessary definition is attained if we regard them from the point of view of the debtor, and in specifying the precise rights recognised by the law we enumerate the duties and obligations which restrict the freedom of the debtor. The policy of the law is to regard a man free where he is not expressly bound, and hence the precise enumeration of obligations (p. 170, *supra*).

In drafting Acts of Parliament or private deeds it is entirely a question of convenience whether we express the law in the form of rights or of duties, just as in literary composition we may use either the active or the passive voice. It depends on what we wish to emphasise. Thus, in the Bills of Exchange Act, 1882, the law is expressed sometimes as a right, sometimes as a duty or liability, and sometimes as a rule or definition. Sometimes the relation may be regarded as a claim in one definite person enforceable against various persons in certain circumstances, or, again, it may be regarded as a liability in one person, which various persons may enforce.

(2.) We have already noticed that in early law real and personal obligations are confused. The distinction is drawn in the names of specific legal institutions, such as services and servitudes—suretyship and pledge.

(3.) One of the earliest classifications attempted is from the point of view of the practical lawyer, who puts enforceable obligations in one class and unenforceable in another, and then struggles with more or less success to square this division with his moral feelings, for he finds a large mixed

class on the border line, which gradually becomes enforceable as legal skill and the general feeling of justice advance. The history of equity in Rome and in England illustrates the process. We have the distinction of *pacta nuda* and *pacta vestita*, and the enforcement of the former by equity. We have the doctrine of consideration in England, with all the refinements of "moral consideration."

(4.) Then we have the Roman classification of enforceable obligations into those arising from contract and those arising from delict, to which we have already referred (p. 168). The purpose of this classification is to facilitate procedure, judicial or extrajudicial. The slightest progress of society must have shown that it was too narrow and quite insufficient for practical purposes. Hence the addition of such classes as obligations *quasi ex contractu* and *quasi ex delicto.* There were *ex hypothesi* only two classes, and any other obligations must be adapted by a legal fiction in order to be placed in one or other of these classes. Such instances of moral obligation or clear common sense justice were involved in the case where a person managed the affairs of his neighbour in his absence, or where a tutor maladministered the affairs of his ward. We may take it that this classification had broken down by the time of Gaius, who made his third class "aut proprio quodam jure ex variis causarum figuris."—(L. 1, pr. D. *de O. et A.* (44, 7)).

(5.) But the most useful classification is what we have already noted to be the common one with reference to interests or ends, and so we have in all our old moral philosophy treatises classifications of *duties*—(1) in regard to the family; (2) in regard to commercial life; (3) in regard to the State; (4) in regard to humanity in general; and lastly, in regard to one's self and God—which last two may always be resolved into duties to one's neighbour, if they ever come within the scope of ethical science, and so at bottom they are ultimately legal.

(6.) The distinction of civil and natural obligations in the Roman sense was drawn by the Roman lawyers thus—

"A civil obligation was enforcible directly by action at the instance of the creditor in it; a natural obligation was one that, by reason of absence of formalities, defect in the capacity of the individual, or other *civilis ratio*, was not enforcible by action, though recognised as a *vinculum æquitatis*" for many legal purposes.—(Muirhead, *Gaius*, 220.)

This distinction reappears in moral philosophy, which, in the hands of earlier writers, was to a great extent a sublimated Roman law, in the form of perfect and imperfect obligations. The distinction is practically drawn by Cicero —(*De Off.* i. 3). The liability of a beggar who has committed an assault on you, but has no other property than his rags and the stick he used, is a specimen of a *perfect* obligation. The gratitude of a rich and generous friend whose life you have saved is a specimen of an *imperfect* obligation. The distinction seems to be that some obligations are enforced in law courts and others are not. The list varies according to the state of civilisation, the skill of the legal profession, and other circumstances. Dr. Reid gives an account of the doctrine as one of perfect and imperfect rights which shows that right and obligation are interchangeable.—(*Active Powers* (Hamilton's ed.), ii. 644.) Perhaps when it was written Professor Lorimer's polemic was necessary (*Inst. of Law*, 2nd ed. 281), but the classification is now merely of historical interest. It became a dangerous fallacy when it was adopted by morals, applied to duties and pushed into the spiritual sphere. The Stoic doctrine, that all sins are alike heinous, was a safer moral rule.

(7.) In early law there is no distinction between civil and criminal obligation. The Roman actions, *Furti*, *Injuriarum*, *&c.*, are proof of this. The following section from the laws of Hlothhære and Eadric takes the same view:—

"If one man call another perjurer, in another's 'flet,' or shamefully bespeak him with abusive words, let him pay a shilling to him who owns 'the flet,' and vi. shillings to him to whom he said the words, and xii. shillings to the King."—(Thorpe, *Ancient Laws of England*, 14.)

What we now call the criminal law in Britain is an abstract

form of what was once a valuable patrimony of the Crown (pp. 118, 127) in exacting penalties. As with the King's private gardens and picture galleries, which may become national property, so the jurisdiction over crime has become nationalised. The King's peace is the national peace. What was formerly an ordinary personal obligation is now a moral duty, and a distinct branch of law and practice. But it must be borne in mind that none of the payments above specified would then have been regarded as arising from "obligation," for, as we have seen, the idea of abstract obligation was late of receiving express recognition in English law.

There is a popular impression that all law is ultimately criminal; and Bentham and Austin undoubtedly support this view (Holmes, *Com. Law*, 82). But it would just be as accurate to make all laws ultimately civil as the forms of English procedure tend to do. Many forces have combined to draw the distinction between civil and criminal responsibility and obligation. We have seen on the side of right, the weakness of the individual impelled him to put his particular right under the protection of society or the State; the strength of society impelled it to claim the jurisdiction or right to deal with acts of violence affecting the general peace; the necessity of procedure and frequently the importance of the interests involved had the same effect; the selfish interest of the State in fines tended to make its jurisdiction exclusive, and even to punish the compounding of felonies, which was the lawful practice of an early age; and now on the side of obligation we find classes of persons who cannot pay fines, for the rich oppressor either pays well or not at all, and we extend the idea of payment. *Quod non habent in ære, luant in pelle.*[1] The debtor has to suffer in person if he cannot pay his debt; the criminal is punished also in person, because he cannot pay his fine; though in mediæval law the process is reversed, for it is quite common, as the pages of Marculfus and the mediæval codes show, to transmute punish-

[1] Quoted by Moncreiff, L.J.C., in *Bute* v. *More*, 9 M. 187.

ment for crime into a money payment. This payment is the material object common to both transactions. The idea common to both is abstract obligation.

As we have seen, in the modern law there is a tendency to regard liability to action as a sanction or penalty (p. 160). So Erskine, in discussing the civil remedy of divorce (i. 6, 47, and 48), speaks of "punishment" and "penalty," terms which would be more appropriate in the criminal or the ecclesiastical law, for the "loss of tocher" is imposed on the offending in favour of the innocent spouse, and not in favour of the State. It is rather of the nature of reparation to the spouse wronged than punishment of the wrongdoer.

(8.) The Scots division of obligations into "conventional" and "obediential" has not been made solely with reference to the form in which the obligations originate. It has been made with ethical or religious ends in view, in order to show that these obligations, which might be thought weaker than legal ones solemnly undertaken, are in reality stronger, and have a natural or even a supernatural sanction. Speaking of obedience, Stair (i. 1, 19) says :—

> "Hence do arise those obligations upon man, which are not by his own consent or engagement, nor by the will of man, but by the will of God. And, therefore, these are fitly called obediential obligations. . . . Such are also the obligations betwixt husband and wife, parents and children, and the obligations of restitution, reparation, and remuneration ; in all which we are engaged not by our will and consent. And such are the obligations which the civilians call *quasi ex contractu*. . . ."

(9.) The division of obligations as expressed or implied [1] may mean only—(1) obligations proper, in the narrow sense; and (2) all others. But is an obligation arising from statute imposing liability on owners of houses express, or is it implied from residence? Is the liability arising from warranty express, when the precise form and extent of liability cannot be foreseen? Is the obligation to provide for the safety of workmen only implied, though it is laid down, and will be

[1] Blackstone (iii. 154) speaks of "contracts *express* and contracts *implied*."

enforced by the courts, and was in view of the parties when the contract was entered into ?

Heaven v. *Pender*, 1883, 11 Q.B.D. 503, illustrates the difficulty of this classification. Heaven was a workman in the employment of Gray, a painter. He was injured by the breaking of a rope, which allowed a staging outside a ship to fall, the staging and rope having been supplied by the defendant, the owner of a dock. The Court of Appeal, reversing the decision of the Court below, held the dock owner liable. This Court had proceeded on the ground that there was no contract between the parties, and no fraud, and therefore no obligation. In delivering judgment in the Court of Appeal, the Master of the Rolls (Brett, afterwards Lord Esher) laid down a general rule, which, however, was not accepted by the other members of the Court. He remarked :—

"If a person contracts with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty ; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another,[1] although there is no contract between them with regard to such duty" (p. 507).

He then instanced two drivers meeting, or a railway company contracting to carry a third party, or the owner of a house or land permitting a person to come to it, and continued—

"It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract by the facts with regard to which the contract is made, and to which it applies an exactly similar but a contract duty."—(*Cf.* "Contractual Rights," &c., p. 125, *supra.*)

The cases as to fencing machinery show that as between two persons an "implied obligation" may mean only one imposed by statute; and if so, why is that not express? If a statutory duty is express, why not one imposed by common law and reasonable custom ?

Implied obligations, like implied rights, are examples of the rules: *cuicunque aliquis quid concedit, concedere videtur et*

[1] *Cf.* the tautology of Right of Liberty, &c., p. 132, *supra.*

id sine quo res ipsa esse non potuit (Broom, 357): *In contractis tacite insunt quæ sunt moris et consuetudinis* (*ib.* 640): *Omne majus continet in se minus* (*ib.* 138). The principal obligation must be undoubted, and the absence of the secondary one would defeat it so clearly that it must have been in the view of a reasonable person entering into the contract.

Thus implied obligations may be deduced by interpretation from statutory duties or contractual duties:

(10.) When we grasp the idea that obligation is not confined to a point of time—that the tie is continuous, and may be separated from the resulting prestation as in obediential or implied obligations, which are truly latent till the time comes for performance, we easily pass to contingent and conditional obligations and debts, corresponding to contingent or conditional rights.

Hearn (*Draft Code*, XI. 5) speaks of "contingent and conditional contracts," but we usually speak of "pure, future, conditional and contingent debts or obligations." These can be valued and ranked in bankruptcy (1856 Act, sect. 53). The Roman lawyers explained the difference of such obligations by saying of future obligations or debts—"dies cedit sed nondum venit." So the law recognises them as debts and allows diligence in security. In the others *dies nec cedit nec venit.*

We make artificial conditions in contracts, or we make stipulations to evade the results of natural events, and then we speak loosely of the facts and circumstances which make up "a case" as conditions.

Legacies and bequests are treated by Bell in a similar way, but as contingent or conditional rights of the legatee, and not debts of the trustee. So we oppose to these contingent rights "unrestricted" right,[1] or "absolute" right.[2]

The law of vesting is treated generally as applying to rights of succession, including legacies and other provisions. But a corresponding doctrine of vesting may be applied to conditional obligations in the modern sense.

[1] Murray, 1895, 22 R. 927. [2] Simpson's Trs., 1890, 17 R. 581.

(11.) The division of joint, or joint and several obligations (Lindley, lxxiv.) is technical, and implies a clear distinction between the abstract tie and the prestation. It depends on the object—the prestation. The right, if it is correal, or the obligation, if it is such, will be extinguished by one performance though there are several persons interested—one obligant out of many can pay the debt; or if the debtor pay to one who has the right to discharge, he is free. The payment may be an event—title or cause—giving rise to new rights or obligations between the creditors or the debtors *inter se.*

(12.) As we had public rights, which might be exercised by any individual member of the State, so we may have public obligations. These may be undertaken and fulfilled by a government as representing the body politic. In the sphere even of crime corporate liability and corporate responsibility are very ancient ideas. The family or the state might suffer punishment for the wrongdoing of a single individual.[1] Municipalities or counties may be responsible for damage done by rioters.[2]

So in modern public international law the State undertakes contractual obligations in treaties dealing with the post-office, railways, and commercial matters, while on the side of delict it claims rights and exacts satisfaction for itself, though the injury may be one only to an individual; or in some cases where individuals are numerous or powerful they may persuade the State to use its whole power on their behalf to enforce private rights, as if they were public. In like manner on the side of obligation we may find a State, including many innocent individuals, called upon to make reparation or to suffer punishment for the delinquencies of one or more individuals, as in the recognised doctrine of general reprisals, and in the common practice of punitive expeditions in India and Africa.

[1] *Cf.* Bagehot, *Physics and Politics*, 103.

[2] Merchant Shipping Act, 1894, s. 515; *cf.* Johns, *The Oldest Code*, p. 6.

(13.) Obligations or duties may be described as political, civil, official, ecclesiastical, military, and so forth. These terms imply either that the obligations arise from the relations in which the person is placed, or that they are undertaken or imposed with the object of accomplishing some end, as the maintenance of the State, or some particular office, the Church, the Army, &c. Political obligations will be dealt with in connection with the word "subjection."

(14.) It is possible also to classify obligations as we have done with rights. They may be antecedent and remedial; or primary, original, natural, imprescriptible and inalienable, or sanctioning, secondary, tertiary, and so forth. We may take the primary duty of a man or a citizen, and follow it through the various forms of obligation to which it gives rise as the circumstances (causes) change.—(See p. 121, *supra.*) The commonest example in legal practice is when specific performance is impossible, and damages become prestable. "In locum facti imprestabilis subit damnum et interesse" (Stair i. 17, 16). This was the idea of the grim legal humorist, who first said, "Quod non habet in ære, luat in pelle."

(15.) We noticed certain words which indicated groups of rights (p. 92). It will be sufficient to note here that such terms as "estate" and "office" denote also groups of obligations.

SECT. XX.—SUBJECTION.

(1.) The Latin words "subicere," "subjectus," suggest slavery, though the literary use has rather a political reference, as in referring to whole nations:—

> "Parcere subjectis et debellare superbos."
> (Vergil, *Æneid*, vi. 854.)

The reference in legal usage may be to property: "Omnis res quæ dominio nostro subicitur, &c" (*Inst.* iii. 19, pr.), or to the *patria potestas:* "homines . . . juri nostro subjectos" (Gaius, ii. 95; *cf.* 161; iii. 104; L. 21, § 2 D. *ex quib. caus. maj. &c.* (4, 6)); or to liability to taxation: "Res exercitui

paratas præstationi vectigalium subici non placuit" (Paul, L. 9, § 7 D. *de publ. et vect. &c.* (39, 4)); or to a liability to pay penal interest: "Maximis usuris vice cujusdam pœnæ subiciuntur" (L. 38 D. *de neg. gestis* (3, 5)). In the Latin Vulgate the word is applied to dominion over the earth and beasts (Gen. i. 28; Ps. viii. 8.)

(2.) The modern usage is political, as the notion of dominion has become political (p. 93, *supra.*) The word "subject," which is correlative with "ruler," suggests that the king "has put all his enemies under his feet," though the obedience is now voluntary. This word therefore contains in germ all the confusion between law and politics.

We regard the king and his subjects as bound by a special tie, which is called "allegiance"; but though the king binds himself by an oath, we do not usually say he is subject to the nation. The words "liege" and "allegiance" are commonly derived from "ligare" to bind, the binding force of this obligation being applied to the subject and not to the ruler. Professor Skeat shows that this is an error (*Dict. s.v.*). He connects "liege" with the German *ledig*, as meaning free. May it not be from the Latin *legitimus?* A liege lord would thus be a *lawful* lord (Scott, *The Talisman*, ch. vi., &c.). But whatever may be the origin of the word, the idea has been transferred from the ruler to the subject, and in virtue of this allegiance and service of his subjects the king may be regarded as officially bound to administer justice and afford protection against enemies. The force behind this obligation may be the king's conscience, or his belief in a supernatural sanction. Discontent of the subjects, the fear of rebellion, and actual rebellion are sufficient, for actual compacts in legal form between kings and their subjects are common, and must have some meaning.[1]

In political obligations we see the ideas of legal obligation and moral duty almost coinciding. Thus in the Naturalization Act, 1870, section 7, we read—

[1] See Magna Charta; Motley's *United Netherlands*; Sigel's *Slavonic Law*, p. 130, as to Poland; Bryce, *Studies*, ii. 10 *et seq.*

"An alien to whom a certificate of naturalization is granted, shall, in the United Kingdom, be entitled to all political and other rights, powers, and privileges, and be *subject* to all *obligations* to which a natural-born British subject is entitled or subject in the United Kingdom," &c.

"Subject" is here synonymous with "liable," as we see from the following :—

"A class of persons who shall be capable of all the privileges, whilst they are *liable* to none of the obligations of citizens."—(Mr. W. V. (now Sir William) Harcourt, *Naturalization Commission Report* (1869), p. xv.)

A citizen is subject to certain definite obligations, because he is subject to the ruler and subject to the laws. In short this word, starting from its associations of conquest and slavery, has been applied to all relations in ever-widening circles until it embraces even moral and religious ideas.

(3.) In the claim of jurisdiction by a tribunal we saw a right against all the world—particularly other tribunals. We may regard the subjection of the individual as the obligation corresponding to this right. But in conflicts of jurisdiction between courts we see the property idea emerge —not necessarily heritable or patrimonial, but official and exclusive property—and an obligation on courts not to interfere with but to respect the jurisdiction of other courts. "Do as you would be done by" applies to courts and states as well as individuals, but such respect may not arise from any motive higher than fear of reprisals. Thus in the second *Orr-Ewing* case (10 App. Ca. at p. 542) Lord Watson said—

"There is, to my mind, a broad distinction between a radical defect of jurisdiction and jurisdiction to entertain, stay, or dismiss a suit, according to the discretion of the Court. The latter is the kind of jurisdiction exercised by the Scotch Courts in the case of foreign trustees; and they are in my opinion *bound ex comitate* to allow a similar jurisdiction to foreign Courts in the case of Scotch trustees. How far the Courts of Scotland are entitled or *bound* to criticise and control the discretion of a foreign Court in sustaining its own jurisdiction, when that discretion has been honestly exercised, it is not necessary . . . to consider." . . . "The Court of Session would have been *bound* by its own decisions, at once to dismiss any such

action" (p. 543). . . . "The principles upon which it has hitherto been held in cases of this kind that the Court of Session was *forum inconveniens* are in my opinion as binding upon its judges as any rules of positive law." (*Ib.*) . . . "I am also of opinion that the First Division had power to grant, and rightly granted, the limited interdict" (p. 544).

Lord Fitzgerald (p. 551) put right and obligation or duty into juxtaposition in saying—

> "There is no question as to the jurisdiction of the Court to decree a sequestration, but as to whether the authority to do so *ought* to have been exercised."

The interference of a court with a person who is not subject to its jurisdiction may thus be a wrong against another court or another state as well as against the individual. It is an offence of the same kind as was dealt with in *Lumley* v. *Gye* (p. 137, *supra*). The obligations involved are—(1) a strictly legal obligation of the respondent to answer to his proper court; (2) a duty on the court to do him justice; and (3) a duty on other courts and states to abstain from undue or unlawful interference with the case.

The words "justiceable" and "justiciable" apply to persons, things, or acts which are subject to the jurisdiction of a court.[1]

(4.) The phrase "subjected to" is sometimes used as making "liability" more emphatic. We find an example in the Ballot Act of 1872. The directions for voting in schedule II. say that a voter who takes a paper out of the polling station "will be guilty of a misdemeanor, and be *subject* to imprisonment," &c. The Act itself (sect. 3) says, "he shall be liable," &c. It seems the common form in the bye-laws as to travelling of all the leading British railways to use the words, "Every person [offending] is *hereby subjected* to a penalty." This is condemnation in anticipation and is contrasted with the ordinary "liability" for damage done.[2] Some other codes of bye-laws combine the words "liable and subjected to."

[1] *Cf.* D. F. Marais, 1902, A.C. 109, at p. 114, where this word is used with "competent" and "have jurisdiction."

[2] These bye-laws are given all in the official time-tables.

(5.) We speak of the "subject" of a right, meaning the person in whom the right is vested. The usage is convenient, and comes to us through Kant from the logical and grammatical use of the word.[1]

(6.) In Scots Conveyancing the term "subjects" is applied to lands, houses, and other property. This is an adaptation and extension of the usage first above noticed.—(Titles to Land Consolidation Act, 1868, sect. 3, &c.).

SECT. XXI.—LAW AND DUTY.

As we have seen, the Latin *Jus*, and the modern words *Droit*, *Recht*, and *Right*, mean not only a right, but also the law which recognises rights; so it seems easy to extend the written bond which makes obligations, to the implied, necessary, still higher obediential bond which unites spouses, parents and children; and, finally, to the general bond which unites all men in society. As we personified the State, and regarded the whole law as the demand—the one great claim—which it made on the subject, so now we may regard all law as only one great duty—one great obligation—obedience. And as we are apt to forget that there are natural bonds prior to written bonds, so we are apt to assume that law is only a written duty—the command of a superior—because in the present day legislation is active. But before men learned to make written bonds they made verbal ones. Before they learned to speak we know they must have had real ones.[2] The social instinct of which we are now conscious must have been present in man, however far down we may trace him in animal development. There is a social bond even among the least gregarious animals. The recognition by society which we saw created right has also created obligation and duty, by teaching, demanding, and enforcing obedience. The natural laws which we observe to prevail, as a physical fact, in all social groups, are gradually learned by man, and on

[1] *Cf.* Gierke, Maitland, xx.; Lindley, *Jur.* App. ii.; Holland, *Jur.* 87.

[2] Grierson, *The Silent Trade*, p. 62, &c.

these he founds positive laws, by which he strives to bind his fellows to certain definite lines of conduct. And within the area allowed by these laws individuals by contract bind each other, so that, like a pyramid, the idea of obligation covers the whole of human relations, while the apex of duty reaches high into heaven. The relations and obligations which at first appeared to be only physical, become legal or moral or religious, according to the view taken by the growing consciousness of the individual and society, until duties and services become claims, privileges, rights in the sentiment of loyalty or religious ecstasy.

As we summed up the idea of Right by saying, "It is right that a man should have right to his rights," so we may say every man has a (moral) duty to perform his duties (to his neighbour), and pay his duties (to the Government). In other words, he is bound (by natural law) to fulfil his (civil) obligations and (political) duties *(Honeste vivere)*.

CHAPTER IV.

LAW.

SECT. I.—COLLISION OF RIGHTS AND DUTIES.

WHEN natural forces come into collision, the resultant is a single effect, in which full justice is done to each original force. A heap of sand has an angle of repose.

Persons in society come into collision. The existence of a right and of a corresponding obligation implies opposition and contact, which in the ordinary normal case is a state of peaceful equilibrium, but if this be disturbed the change of circumstances may give rise to excessive friction and heat. An external event—an accident—may alter the interests of the parties. A change of mind in the parties may transform a right into an obligation and an obligation into a right. When persons feel rights, and come to express these in the form of claims as against particular individuals, these claims also appear in collision with those of all other persons—the world in which they live. Collision is of the essence of right, and has been implied in all our previous discussion, but it must now be set apart for separate treatment, along with the physical fact of sympathy on which law is founded.[1]

Two persons wish to stand on the same spot to see some performance or occurrence. We may take this as the simplest example of a collision of claims. If they fight for the place they will probably injure each other, and defeat their original purpose, for while they are fighting the spectacle may be over. To anticipate the rule of *Nature, Prior tempore*

[1] Adam Smith, *Moral Sentiments*, pt. 3rd. As to sympathetic strikes and lock-outs, see Reeves, *State Experiments in Australia, &c.*, ii. 88.

potior jure is prudent for many reasons. First, the second place may not be really inferior to the first; secondly, even if it is, the fighting for the first may not get it, but may give it to a third party; thirdly, the presence of a companion in the first place may be a positive advantage to point out incidents, and enable both to see better; fourthly, each may think his presence and the acquiescence of the other may establish a precedent, and he himself will be first next time. An ancient amphitheatre may be taken as a type of an orderly society. If all crushed and pushed on the level ground none would see or hear. But the invention of a theatre enabled all to see at once. The Latin *ordo* (from root of *orior*, I rise)[1] points originally to physical separation of rows—tiers rising one above the other. The seats might be marked laterally. The order of choice might be fixed by priority; or by ticket, allotted either by ballot or by priority of application, or by special reservation. The ticket is a title—*titulus*. Any seat in the building is a privilege; some might prize even a glimpse for a minute. Each seat has its own special advantage; if in the front, you see and hear better, but you may see too much, and you may be exposed to danger; if at the very back you see less of the stage, you see more of "the house," which is often much more interesting than the stage."

Here, then, is a type of law. The crowd sympathise with a person who has been waiting patiently, and they resent the rudeness of a new comer who tries to elbow his way in. They all feel the case their own, hoot at the intruder, and help to push him out. Then come professional door-keepers; the persons in charge, the police, keep order and show persons to their seats, or keep the crowd outside standing *en queue*. The crowd, from habit or from rational conviction, adopt the same rule, and take the places assigned to them. There are no doubt other disturbing elements in a theatre crowd—*e.g.*, the new woman, who combines the extreme past

[1] Mommsen, *Staatsrecht*, iii. 459; quoted in Smith, *Dict. Antiq. s.v. ordo.*

and the extreme future by rudely pushing to the front, on the ground that men ought to be polite and give way to "ladies"—*place aux dames.* This is merely a disturbing element, which must be dealt with in settling places. It may result probably in her finding a place somewhat higher than she would have got otherwise; or it may provoke a reaction which will put her lower.

Prior tempore potior jure is a type of a natural law in the jural sense. It is a rule deduced from experience; it generally attains the end desired—namely, order. It has a physical basis in history, for those who were first in the world had many rights as against their successors. It has a sanction in the feeling of claim and the fists of the person in possession; it often raises a feeling of duty and obligation of acquiescence in the breast of the later arrival compelling him to respect vested interests; and finally, it has the support of society, whose interest is order, and to whom it generally is unimportant who occupies any particular spot. If the feeling raised in the breast of the new comer is not one of acquiescence, but of resentment against the first occupant, his interests may found a new claim, which may be acquiesced in by the person in possession; if not, the ultimate result will depend greatly on the position assumed by society. If this approves of the new claim, it will lay down some more general rule than mere priority.

"All the world is a theatre; and all the men and women are actors or spectators." The problem placed before those who temporarily manage the world-show, is how to keep order and so arrange things that everybody may occupy a comfortable space, and see or do just enough to satisfy him. Laws are the means discovered or invented for this purpose. Just as the theatrical manager drills his chorus and his troupes of dancers and the various actors to make their entrances and their exits at the proper time, and to arrange themselves picturesquely on the stage while they are there; and just as the door-keepers and others arrange the audience

in order in their seats in the auditorium, so rulers and governors, kings, wise men, first-men, leaders, draw up rules and drill their subjects until these rules become instinctive intuitions. In one view the proximate end is merely order among the particular individuals concerned, and the remote end liberty to exercise all their faculties and powers as human beings. In another view the proximate end is liberties, claims, rights, so that all may be satisfied; and the remote end is order, the ideal state in which the individual holds the position suited to his capacity of promoting the ends of Society.—(*Cf.* Lorimer, *Inst. of Law*, 368.)

The framing and the application of such rules become a special art, and hence the rise of the legal profession from the highest legislative and judicial functionary down to the humblest executive officer. To the subjects who obey these laws, or follow them in their conduct, a simple rule, apparently axiomatic, to which it is difficult to find a plausible alternative, appeals with irresistible force. It may be applied in directions extending far beyond what its inherent reasonableness warrants. Thus prior discovery is not necessarily the sole basis of property; nor is primogeniture an irresistible law of nature in succession. Breeders of stock might prefer secundogeniture on grounds of analogy and experience. The ordinary civilised man is ready to obey; and some savages may be intimidated. An infallible church, a hint of the manners of good society, a printed rule in a book of etiquette, even a ready opinion given by a person with a loud voice, are all examples of ordinary means of commanding obedience.

A change of interest and the resulting dispute as to right may arise, as we have seen, from an external event. A malicious person sets fire to a building while it is still in the builder's hands. The delinquent cannot pay. Who is to bear the loss? Or it may be struck by lightning, and the same question arises.[1] The builder has many argu-

[1] M'Intyre *v.* Clow, 2 R. 278, a case where a building was blown down.

ments. The erection was on the ground of the other party; the other party has paid as he went along; the materials were delivered; and the builder put his labour into them as the work progressed. He is a poor man and cannot afford to lose, while the landowner is rich. The landowner says that he merely advanced money to accommodate the builder; he has got no benefit from the work; why should he pay a penny? At first sight this is an insoluble puzzle; and the case becomes still more complicated when the parties allow their feelings to work. Each thinks his opponent mean, the one because he will not pay, the other because he demands payment. When law intervenes it forbids violence; but when it attempts to make science it finds difficulties. It may speak of acts of God, and loss falling where it lights—*res perit domino.* This is pretty much an evasion. What else is open? The richness or poverty of the parties may disturb the judgment, but is truly irrelevant in the first instance. At least it is a dangerous principle to apply, for it may lead to the respecting of persons and the contradiction of elementary justice. We make theories of property in land, delivery of moveables, and at the end come to a decision in accordance with custom, precedent, the ideas and prejudices of the community. This is perhaps logical if you admit the premises. But at bottom it comes back to the first rule, "Don't fight," and the parties then settle down to make the best of their difficulty. Bloodshed or litigation is unprofitable for reparation of the disaster. But the friends of the disputants and the community may have an interest in the dispute. They may even quarrel as partisans. And if they find the problem insoluble they may out of charity subscribe, and so bear a share of the loss. As a legal invention, insurance meets such cases—organised contractual subscriptions for charity. Insurance gives the public a real pecuniary interest in calamities, and so we see insurance companies set up establishments for the extinction of fires. Insurance has made the loss their own. For their own sake they strive to

extinguish fires, and so benefit indirectly the original proprietor and the neighbouring proprietors. Insurance is thus much more than a legal invention.

We may profitably postpone a definition of law, and also a discussion of the various terms which are synonymous with it, until we have observed the various aspects in which law presents itself in actual life. It changes with the society to which it applies, and also with the standpoint from which we view it. In early times, when right was a mere vague claim, when abstract obligation was perhaps unknown, and duty a vague feeling more religious than legal, law was correspondingly vague. In early English *riglit* expresses both the claim of the person and the recognition of it by society; and we may say that in our artificial sense law did not exist. In still earlier times order was kept and violence repressed by leaders or heads of tribes; they decided disputes by reference to customs which they knew, or by what they thought justice. They had not even rules of procedure. Such skill or science as they possessed was traditional and instinctive like their poetry and eloquence, their agriculture, architecture and art.

The change in the laws of Cnut in England from the use of *right* to *lagu* (law) marks a transition to an organised state and definiteness in law; and though the word "law" retains its place in subsequent history its meaning must surely change, when we think of the gradual differentiation of the officers and practitioners of the law—king, judges, advocates, solicitors, notaries, accountants, patent agents, officers, policemen, inspectors of multitudinous kinds, juries, remittees, reporters, witnesses—scientific, medical, ordinary—all practising law, limbs of the law or lawyers in some sense. Each new application or extension has added something to our idea of law. Every age has widened the definition as a practical art with corresponding science, and ultimately a philosophy which appeared to explain the whole satisfactorily at least for the time. In early history we find

law and politics identified in the ordinary civil and criminal laws, and law and ethics identified in the family and marriage laws. Religion, too, is either politics or the supernatural side of it. The history of law on its formal side is the history of this differentiation in officers and mode of expression. Even when law appears, it is a single complex phenomenon. There is no distinction in Hebrew law between procedure, evidence, substantive law, and execution. It is said that the witnesses formulated the charge; if two agreed that might be sufficient to secure condemnation, and finally the witnesses stoned the culprit.[1]

Rights and duties both involve law. A right is claimed by one as a member of society, and the person asserting it impliedly asserts that any other member in his place would be entitled to make the same claim and receive the same judgment. It is not a merely temporary feeling, a capricious claim, but a feeling which belongs to him as a man. He calls both for the substantive object of the right and the recognition of the right by the State or society. The much persecuted Shylock combined these :—

> "Justice! the law! my ducats and my daughter."
> (*Merchant of Venice*, ii. 8, 17.)

though in his mind the ducats came first, then his daughter, while justice and the law were merely means for their recovery. When a man calls his claims rights, he affirms that the interests of society are involved in the satisfaction of these claims.

So a duty is not merely a physical *bond* or *necessity*. It is laid on him as a member of the society to which he belongs; and any other man in the same position would have the same burden imposed on him. He feels bound, because every man expects that he will do this duty. Slaves may require command. A word of expectation suffices for free men. As we have seen, the old Irish code prescribed "fasting" in the

[1] Innes, *Trial of Jesus Christ*, 27 and 41; p. 51, *supra*.

case of persons *of distinction.* The appeal to the King's conscience and honour is enough.

We may illustrate this from ordinary legal procedure. When a superior court remits to an inferior judge to pronounce a particular judgment, it may be said his function is no longer judicial, but executive. He is bound to obey and he does obey. Thus the Judicial Factors Act, as we shall see later, may declare a sheriff "bound" without expressing any sanction. The judge administers the law because it is the law, and not because he is bound. The good citizen obeys the law instinctively and unconsciously. Right, duty, and law may be absolutely identified.

In point of form the abstract notion of "case" is the meeting-point of right, duty, and law. It implies the abstraction of certain facts and the formulation of a claim to do something in consequence thereof. It implies the existence, both in the Roman and in the modern sense, of an obligation, which is "the mother" of an action (p. 158). It implies lastly the weighing and balancing of evidence and of competing rights, which result in a deliberate judgment on the facts as presented. But the decree is law in a new sense. The claimant now feels that he has a true right; the respondent that he is now really bound. The decree supersedes all that precedes it, and the change in the relations of parties may be enormous. In the Roman law even litiscontestation operated as novation of an obligation.

SECT. II.—LAW A PROCESS OF DEFINITION.

Definition is the essence of law in its aspects of claim, prestation, and recognition. Definition either settles disputes or anticipates them, and so prevents possible collisions of claims. It may be said that when we get a group of facts which make a stateable "case," definition is already implied. Thus the early law of property is a question of "titles" and

marchstones and allotments—*νόμοι* and *νομοί*. The stones set up solve or prevent disputes; they are evidence to strangers and to judges; and their removal is a deadly crime. Without the invention of money, weights, and measures the law of obligations could not have been developed. The Latin "nummus" is connected with *νέμω* (I distribute)—*νομος*—*numerus*—Numa and Numitor, primitive lawgivers. Money enables parties to make their rights definite, and it enables a debtor to know how to pay, and when he has paid if he is really free. It enables the judge to compromise—Solomon's difficulty does not arise—for as a general rule both parties are somewhat in the wrong, and the desire to gratify *both* is natural:

> "Thus
> Was justice ever ridiculed in Rome:
> Such be the double verdicts favoured here
> Which send away both parties to a suit
> Nor puffed up nor cast down,—for each a crumb
> Of right, for neither of them the whole loaf."
>
> (Browning, *The Ring and the Book*, ii. 747.)

There are two directions in which the order of a primitive community might be broken:—*First*, by infringement of existing rights; and, *secondly*, by violent attempts to redress wrongs. These give rise to the two main ingredients of early codes—Criminal Law and Civil Procedure. This is indeed a modern way of speaking, for they are truly co-ordinate branches of law, and not separate, as we now regard them.

There is a collision between the right of the creditor to his claim and the right of the debtor to his liberty, and the right of the public to peace. It is these matters which early codes regulate. The first provision of the Twelve Tables deals with citation, and only allows force in case of resistance or flight; it allows an excuse for age or illness, and provides for litigation being carried through in the daytime. One of the rules permitted what we have called "obvagulation" (p. 58) and ran thus: "Cui testimonium defuerit, is tertiis diebus ob portum obvagulatum ito": *i.e.*, if one has no witnesses (as

in ordinary procedure), let him make a disturbance before the door of his debtor every second day. We may imagine what it may have been when the creditor was unrestrained; there would be a continuous disturbance of the whole neighbourhood for days and nights on end; but now that his power is limited, he may achieve his end quite as well. As we have seen, this mode of recovering debts prevailed in India down to our own day, when sitting dharna was practised.[1] The similar procedure of Fasting was regulated, as we have seen from the *Senchus Mor*, by restricting it to the case of debtors "of distinction."

"An eye for an eye, and a tooth for a tooth" was no doubt the reform of a system which exacted a life for an eye, or even for a tooth. Instead of rude, instinctive retaliation, this limitation of the unbridled wrath of the person wronged implied deliberation and judgment, so that he might take the eye or the tooth and nothing more or less.[2]

Such a provision of the Twelve Tables as allowing monsters to be killed at birth may well have been an attempt to restrain a custom of general infanticide, and the statement of Dionysius that five near neighbours were required as witnesses shows an attempt to represent the State effectually in deciding the question of life or death.—(Bruns, *Fontes I. R.*, 7.)

The whole procedure narrated in the Third Table is in the way of limitation of cruelty and caprice. Delays are to be given—thirty days. Fetters are limited to fifteen pounds;[3] the prisoner-debtor might live at his own cost; but if he could not, the creditor was to allow him a pound of spelt a day—more if he liked. The debtor was to be brought out on market days in the comitia before the prætor, and the amount of his indebtedness proclaimed; and then only could he be sold as a slave.

Compare the old English law :—

[1] See *Laws of Manu*, Bühler's trans. viii. 49, note.

[2] Johns, *The Oldest Code of Laws in the World*, Edinburgh, 1903, p. 43.

[3] But see Muirhead's *Roman Law* (2nd ed.), p. 191.

"Let no man take any distress, either in the shire or out of the shire, before he has thrice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the shire-gemot, and let the shire appoint him a fourth term. If that then fail, let him take leave, either from hence or thence, that he may seize his own."—(*Laws of King Cnut*, Thorpe, 165.)

Thus law is regulated self-help.

William the Conqueror in his laws provided :—

"Interdicimus eciam ne quis occidatur vel suspendatur pro aliqua culpa, sed enerventur oculi, et abscindantur pedes, vel testicuii, vel manus, ita quod truncus remaneat vivus, in signum prodicionis et nequicie sue : secundum enim quantitatem delicti debet pena malificis infligi. Ista precepta non sint violata super forisfacturam nostram plenam."—No. xvii. (Thorpe, 213.)

This appears now to suggest revolting cruelty. When written, was it not promulgated in a spirit of humanity? Had it occurred to persons putting down crime that the punishment should fit the offence?

The whole law of taxation is a regulation of capricious exactions—a balancing of the right of the individual to his liberty and private property, and the right of the State to exact the means of self-support and self-defence.—(*Cf.* Pollock and Maitland, i. 70.)

One other example may be given. We have already seen how the right of action may be abused, by being made a means of persecution or of gratifying revenge. It is a right which the courts are slow to disturb (*Neale* v. *Gordon Lennox*, 1902, A.C. 465), but when the action is made an end in itself, it is a wrong to the defenders, and now the legislature has interfered by the Vexatious Actions Acts, 1896 and 1898. The vexatious litigant may, on the application of the Lord Advocate, or the Attorney-General in England, be deprived of his right of raising actions, unless he can prove a *prima facie* case to the Court.

SECT. III.—WITNESSES AS JUDGES.

Witnesses are members of society immediately interested

in a dispute. They may be interested because they are spectators. They may have seen the result of the wrong. The bystanders are the first witnesses, and they are naturally appealed to as the first arbiters and judges. In any case they discuss the matter and pass judgment on it. As in Browning's great tragedy the husbands take one view, the wives another; knowing men of the world take a third, and others according to their standpoint. They may be friends of the claimant or the respondent, merely reinforcing the claim or the answer to it by stronger assertion.

In early criminal procedure, which was merely summary execution, the witness was essential. But for secret crimes the Roman *quæstio*, mediæval torture, and the modern French procedure were resorted to for the purpose of extorting confession and making the accused a witness in the modern sense against himself.—(Stephen, *Hist.* i. 532, iii. 477.) Under such a system innocent persons sometimes preferred to suffer punishment than to undergo torture.—(Fisher, *Social Germany in Luther's Time*, pp. 45-47.)

We may take the appeal to or the interference of a third party—witness, arbiter, and judge all in one—as the first physical aspect of law in a special sense.

The primitive English juries were witnesses who spoke to the facts or to the character of the accused. They were interested in the parties and the peace of the locality. This fact still survives in the oath administered to jurymen. They might also be judges and possible executioners, as in the early English hue and cry[1] and in the Hebrew procedure,[2] and as there is always a tendency of interests to become personal, it is only reasonable that an appeal should be allowed to a higher power. The most ordinary witness even in modern practice becomes a partisan and must be corrected by cross-examination. The more he knows, or thinks he knows, the nearer he comes to fancy himself a judge. The scientific and skilled witness is an avowed

[1] Pollock and Maitland, ii. 577. [2] Pp. 51 and 211.

partisan paid by his own side. He is an advocate. Witnesses are at first accidental, and, if we may say so, natural. The stage of invention is reached when persons are called or prepared to witness a legal transaction. In the Roman procedure, where acts were done before five witnesses, it was a judicial representation of the State to see that things were done regularly, as in the ceremony of mancipation, and in the procedure *de inspiciendo ventre*, where five matrons were called in.—(D. 25, 4; Bruns, 199.) So also in Anglo-Saxon laws as to sales of cattle.[1] The four witnesses to contracts required by Mohammedan law, so often mentioned both in the *Qur'ân* and *The Thousand-and-one Nights*, are the same; so are the modern witnesses to deeds.

The modern judge may become a witness. There are many facts relevant to the inquiry, matters of every-day experience, which he knows or must discover for himself. He may have a view of the subject in dispute. He judges of the demeanour of witnesses and of the parties with his own eyes. He is a witness who judges by hearsay corrected by facts and careful scrutiny. The modern arbiter, the referee, or remittee, who judges without hearing evidence, is often a witness himself. He inspects before he reports his judgment.

Foreign law is proved by witnesses who may be fairly judicial or purely partisan, like advocates.

An advocate is a witness as to the law, which he assists the judge to discover. Interruptions from the bench are his cross-examination.

As witnesses come before the Courts they also claim rights, and these rights are necessarily a subject of regulation. The early law of evidence is thus a law of procedure. The ruler may be merely telling a crowd of accusers that they must speak only one at a time. But witnesses may feel that they have other rights than merely to get a hearing. Their

[1] Pollock and Maitland, ii. 182; *cf.* the Code of Khammurabi, sect. 9, &c.; Johns, *The Oldest Code*, p. 3.

feelings may have been outraged by seeing a crime committed, and they demand a right to punish—to cast the first stone. To question their veracity or their judgment may be felt by them to be a personal wrong.

And finally, in modern practice we have the right claimed and enforced of compelling a person to give evidence. This is a supplementary right of the right of action. To give evidence is a *public* duty.

The oath which still survives in modern procedure carries us back to the very earliest conception of a witness. If the person could not carry through a transaction in presence of the requisite human witnesses he called God to witness, for He was all-seeing and all-knowing, and if the oath were false, it was assumed that God would punish the perjury in His own time and way.[1] The mediæval Christian or Mohammedan who dealt summarily with a felon caught in the act—as a judge still deals summarily with contempt of court—had no difficulty in extending and attributing to supernatural beings the same powers of judgment and punishment. These knew the law and also all the facts accurately, and they had absolute power to award and execute the appropriate penalty. Modern theology tends to postpone and mitigate, if not abolish, the penalty, and hence the proposal made in some quarters to abolish all oaths as unnecessary. It may even be dangerous to rely on them as a security.

SECT. IV.—THE RULER AN EMBODIMENT OF LAW.

In the person of the king, or a judge with jurisdiction, or public bodies within the State, rights, duties, and laws are practically interchangeable ideas. *Jura regia* may mean the Royal laws or the patrimonial revenue derived from taxes, fines, and forfeitures.—(See Leges Hen. I., p. 118, *supra*).

The king is a person who claims jurisdiction over other persons—his subjects; and in making his claim he excludes other neighbouring kings who might covet his place, nobles

[1] P. 418, *infra*.

in his kingdom who also might aspire to rule. When the king's claim is recognised within the State it becomes national law—a part of the law of the land. When recognised outside of the State it is international law.

In the early king we find politics and law united. In his person he is a definition of law in all its senses—a physical embodiment of law. He naturally and unconsciously assumes jurisdiction and the duty of judging. He is recognised and appealed to by his subjects as ruler and judge. The legal fame of Solomon was founded on his skill as a judge, and not on his wisdom as a legislator. In the East the idea still survives (p. 59, *supra*). In the West it survives in our use of the word Court, and in forms of legal writs.

The witness, as we have just seen, may become a partisan as full of prejudice as one of the parties, and may even become a criminal, as we see in the institution of lynch law. Hence an arbiter becomes necessary to adjudicate between the secondary rights of the witness and the rights of society and the State.

The king in one aspect is a proprietor looking to the prosperity of his domain. He does not distinguish between dominion and jurisdiction. His motives may be the same as those of a slave-owner who prevents his slaves from injuring each other, or a stock-breeder who keeps beasts from fighting.[1] This natural confusion of private dominion (property) and public jurisdiction is seen in many relations. Thus, in the time of the Ptolemies as well as in the days of the Pharaohs, Egypt was, for practical purposes, regarded "as the personal property of the sovereign."[2] Was the revenue drawn by the king a land tax or rent? and after all what is the difference?[3]

[1] Perhaps the Romans in their treatment of conquered races were an exception. Bryce, *Studies*, i. 26.

[2] Grenfell and Mahaffy, *Revenue Laws of Ptolemy Philadephus*, Int. xxvii.; *cf.* Gen. xlvii. 18, 26; E. Dicey, *Story of the Khedivate*, p. 70, &c., and the opinion of Lord Kinnear in *Smith* v. *Lerwick Harbour Trustees*, 17th March 1903, 40 S.L.R., p. 509.

[3] It is a similar question whether the property and endowments of the

As we shall see hereafter, the earliest judges were viceroys or deputies of the ruler. They were rulers of an inferior rank. So an ancient Hebrew story tells us how Moses sympathised with a Hebrew who was beaten by an Egyptian and thereupon killed him. The nature of his self-imposed office is shown by the question asked by a Hebrew next day, "Who made thee a prince and a judge over us?" The question implies that if Moses had held a commission the whole position would have been changed.

It is no doubt true that the modern king becomes more or less a private individual, in so far as his private rights are concerned. Law, like religion, has become a spiritual as well as a physical force; and just as the king may be officially the head of the Church, but yet take part in public prayers, which place him on the same level as other worshippers, so the king, as official head of the State, may be incapable of doing wrong, while in all his private affairs he himself loyally acknowledges the supremacy of law.[1]

SECT. V.—UNWRITTEN LAW.

Witnesses, judges, and rulers are the physical beginnings of law. The compilation of codes and the distinction of written and unwritten law imply the invention of letters and a great advance of civilisation. But law must have existed, like poetry—and probably in a versified form—prior to the invention of letters. It must then have been the subject of oral tradition with all the value and all the danger of legal maxims. These are good servants, easily learned and remembered, but bad masters if they are interpreted strictly and as rigid law. Law, then, was spoken or unspoken. The inspired judges who inquired of their gods would prove their inspiration by their knowledge of traditions; they trans-

established churches are public or private. The question was an acute one in ancient Egypt, as is shown by the authorities quoted in the last note.

[1] In early English law this was so in a somewhat different sense.—Pollock and Maitland, i. 496.

mitted the tricks of their trade to their successors. A decision would be remembered by the people and the judges. That was law—the true unit of legal analysis—the single judgment or doom—*a* law corresponding to *a* right and *a* duty. It implied all that is in law, just as the humblest weed on the garden walk and the smallest insect in the summer breeze imply all the mystery of life. So old collections of laws—the Judgments of Khammurabi, the Dooms of Cnut, the *Consolat del Mar*, the *Jugemens D'Oléron* —are collections of decisions transformed into precedents.

Before such decisions as these were officially collected into codes, they were used and relied on by private individuals, as we see from the petition of Dionysia among the Oxyrhyncus Papyri (ii. 168).

This is partly the value of public corporal punishment. The pillory, the jougs at the church door, the gallows—all bring home to the spectator the knowledge that a doom has been pronounced and executed. This is law. It is a later idea to apply the name of law to the rules like those of the Conqueror (p. 215, *supra*), which regulated the powers of executing and maiming criminals.

When our libraries were wandering minstrels our law reports were the memories of old men.[1] As boys they had perhaps been whipped at the riding of the marches.[2]

The boundary stone was the earliest evidence of title.[3] "Cursed be he who removeth his neighbour's landmark"! We have seen how the Babylonian conveyancers amplified their denunciations. Plato says boundaries are sacred to Zeus. Διὸς ὁρίου μὲν πρῶτος νόμος ὅδε εἰρήσθω, κ.τ.λ.—(Laws, viii. 842*e*; Jowett, v. 411.) The Roman poets have also legal associations, as when Vergil speaks of a stone—

> "Limes agro positus, litem ut discerneret arvis."
> (*Æneid*, xii. 898.)

[1] See Sigel's *Slavonic Law*, 52, 94, 108, 138, &c.

[2] Stair, iv. 43, 7; Wallace, *Russia*, chap. xxiii. *ad fin.*

[3] Stair, ii. 3, 73: Ersk. *Inst.* ii. 6, 2, and the authorities collected in Grierson, *The Silent Trade*, pp. 11 and foll., 28.

And Ovid in the familiar passage (*Fasti*, ii. 659) where he tells us that the god Terminus refused to yield place to Jove says :—

"Tu populos, urbesque, et regna ingentia finis :
Omnis erit sine te, litigiosus ager."

The statue of the god Terminus "was merely a stone or post stuck in the ground to distinguish between properties." When ornament was sought, the carved figure of the god was naturally suggested. He personified and represented law.[1]

"The boundary stone at its first setting up was consecrated with peculiar ceremonies. A trench being dug, a victim was sacrificed ; the blood was poured into the trench, while the ministrants were veiled ; . . . the body of the victim, along with corn, fruit, incense, honey, and wine, was cast into the trench, and the whole consumed by blazing pine-brands ; the boundary stone was set upon the bed of ashes . . . On the festival [of Terminalia] the owners of adjacent property crowned the statue with garlands and raised a rude altar on which they offered up some corn, honeycombs, and wine, and sacrificed a lamb or a sucking pig. They concluded with singing the praises of the god."—(Smith, *Dict. Antiq. s.v.*)

The invention of letters has important effects. It makes tradition precise—makes solid what before was fluid. Law, then, almost changes its nature. Before it was a rude and physical infliction ; now it is the written doom—decree—particular or general—still physical and inevitable.

Writing can be used either for the future or the past—either to issue a general decree for time to come or a particular one for the present, or to record the dooms of the past as precedents.

The Roman edicts, founded on experience of the past, dealt with the future. Our law reports deal only with the past and are framed with a view to future use, as the share list of the Stock Exchange gives you yesterday's prices, so that you may fix those of to-day. The small variations and the short steps required from day to day may be taken

[1] *Cf.* Lord Avebury's views as to Hermes and his relation to boundaries, *Origin of Civilisation*, 6th ed. p. 318 ; pp. 43, 153, *supra*.

by ordinary legal practitioners. Great changes and great chasms must be bridged by legislation. After the bridge is made by legislation the ordinary routine of the legal practitioner and administrator again commences to apply the law to ordinary life. Progress is a multitude of steps. Again the law is seen not so much in the general act of legislation as in a multitude of decrees or legal decisions, judicial or extrajudicial. The hasty, stupid, or it may be dishonest Act of Parliament has to be interpreted and applied in accordance with justice.

In modern practice we may notice an interesting combination of both of those modes of proceeding, that is to say, by actual general legislative decree, and by collecting and publishing cases as precedents. All railway companies issue bye-laws, which are approved by Government and have the force of law, dealing with police offences or attempts to defraud the companies. Although these laws are duly published in various forms and exhibited openly, they seem to be unknown to many members of the public. Even public prosecutions, and reports of these in the newspapers, do not appear to be sufficient. The railway companies therefore make out lists of the names of the persons prosecuted, the particular offences and the punishments inflicted, and exhibit these prominently in all their stations. This pillory is effectual. The concrete cases are more easily understood, and hundreds read these bills who would not read, and reading could not comprehend, the laws. It adds considerably to the punishment, as we see from *Buchan* v. *The North British Railway*, 1894, 21 R. 379, and hence some French railways omit the names. To some persons these reports of "cases" lay down the law for the first time—they are the law; whereas the upright citizen would find the law of the land without stringent bye-laws, or even the moral law and his own conscience behind all, an amply sufficient guide, while the circumstances would themselves often suggest the proper course of conduct to adopt—to him a natural law.

SECT. VI.—CODES.

When the necessary division of labour or the recognised skill of one man marks off the judge from the ruler, we may say we have the first stage of the professional lawyer. He also, like the private individual, claims rights which come into conflict with rights of individuals and society. These collisions require regulation. We then come to the era of Codes of Law. We require codes for two purposes—(1) to instruct the judges, or (2) to restrain their caprice.

The Jewish code in Exodus (xxi. 1) is a text-book for judges. "These are the judgments which thou shalt set before them."[1] Nowhere is this better illustrated than in the laws of Manu. The first six chapters deal with supernatural matters, and with the Brahmans who are members of the spiritual society, and their rights, privileges, and duties. Chapter VII. begins—"I will declare the duties of kings, (and) show how a king should conduct himself, how he was created, and how (he can obtain) highest success." The king belongs to a lower caste than the Brahmans, but his duties invest him with great power, and this chapter gives him many precepts and hints on Oriental politics. Among his duties is that of dispensing justice, and so Chapter VIII. begins:—

> "A king desirous of investigating law cases must enter his court of justice preserving a dignified demeanour, together with Brahmanas and with experienced councillors. There, either seated or standing, raising his right arm, without ostentation in his dress and ornaments, let him examine the business of suitors, daily (deciding) one after another (all cases) which fall under the eighteen titles (of the law), according to principles drawn from local usages and from the Institutes of the sacred law."

Here follows a short outline of law, hints as to witnesses, and rules as to debts, deposit and pledge, sale, partnership, and other legal topics. This is an incidental digression to enable the king to do justice to his subjects. The following chapter deals with husband and wife and family law, which is outside of the ordinary royal administration of justice.

[1] *Cf.* The Code of Khammurabi; Johns, *The Oldest Code*, pp. vi. and 57.

The code concludes with lists of sins and punishments, so that it was ultimately supernatural sanctions which operated on the king and rulers to compel them to do justice to their subjects in respect to ordinary material rights; and on husbands and *patresfamiliarum*, to compel them to observe the ethical code, which was law within their little circle of jurisdiction.

Professor Sigel gives many examples of this use of codes, as in the Bulgarian "Instruction for Judges" (*Slavonic Law*, pp. 18, 52, 139, &c.).

This aspect of law is seen so recently as in the Sale of Goods Act, 1893, which gives rules for ascertaining intention as to whether the property in goods sold has passed (section 18). So the Partnership Act, 1890, gives "rules for determining existence of partnership" (section 2).

Much of the discussion in Roman law (*e.g.*, Book II. of the *Institutes* as to property) was for the information of judges called upon to decide such questions, just as lawyers or inspectors of poor may discuss cases in which the paupers themselves have little direct interest.

Professor Dicey (*Conflict of Laws*, p. 4) defines private international law as a set of rules to guide judges in the choice of law. But all rules were originally for judges, while no rules are at the present day intended for their exclusive use, or even for that of practitioners.

A judge is only a man, and more especially in primitive society, and where laymen act in this capacity, he is not very different from the other members of the community. His office is a privilege, a right, a jurisdiction, and he may be tempted to twist his decisions to suit himself, or his friends, or his order. Codes restrain this tendency. They are not legislation in the modern sense, but in general compilations of well established customs. The code is a law to regulate the conduct of the judge in the administration of justice. The demand for a "general" rule, and the definition of law as "a general command" are due to the notion of justice, which excludes the arbitrary caprice of the judge.

The Roman law gave an action against a judge who made a cause his own. It created a liability *quasi ex delicto*. But in primitive times the evil may have been a real one and the remedy more than doubtful. In the first century B.C. it was found necessary to restrain the Praetor from arbitrarily altering his edict.—(*Cf.* Johns, *The Oldest Code*, sect. 5.)

These primitive codes gave or regulated rights of action, and they also set up definite rights in place of the vague desire of revenge. In a recent Government report as to affairs in Egypt a story is told of a native who quarrelled with a neighbour about a small heap of manure, and ended by murdering him. When asked why he did not go to the law courts with such a trifling matter, his answer was—"I wanted revenge; the courts would not give me this."

Thus the Anglo-Saxon codes gave definite rights to the king and to the person injured, and so attempted to regulate and restrain the vague feeling of revenge. It operated variously; it gave a pecuniary recompense to the person wronged; it punished the criminal; and it threatened punishment to the breaker of the peace and the law.

Reference may here be made in passing to an interesting volume published by Mr. Ernest Alabaster, of the Chinese Customs Service, on *Chinese Criminal Law* (London, 1899). We see in the Chinese codes the characteristics of other ancient codes. The earliest were composed for the judges. The first regular code "appears to have been divided into six portions; the first three parts relating to practice, the fourth to the general administration, and the last two consisting of an exposition of offences" (Int. xl.). The codes recognise fundamental laws, independent of the head of the State. They also allow self-government within the family, as in the laws of Manu, and leave local guilds to decide matters of commercial law. A remark of the Emperor Ch'ien Lung is quoted:—"The object of law is to avoid the necessity for private vengeance, and law once satisfied, it would never do to allow the individual to take further action" (p. 6). One

of the peculiarities of Chinese law is excessive definition and drawing of distinctions, as, *e.g.*, in murder; another is the prolixity of inquiries through appeals. But however grotesque the details may sometimes appear, the rules are law as much as the statutes of the third year of His Majesty King Edward.

Sir Henry Maine (*Ancient Law*, chap. i.) has drawn a distinction between the Roman and the Indian codes that the latter were framed at an earlier epoch in the history of the people to whom they applied than the former, and were therefore instrumental in strangling the legal progress of the people; whereas the Roman law progressed in spite of, or rather because of, their early code. Another distinction may be suggested. A code is a machine to define and modify rights. Its result depends on the use to which it is applied. The Indian codes were framed by priests to restrain and define the rights of the people; the Roman code to restrict and define the powers of judges and the powerful classes. The Indian codes were framed and used by priestly castes to enslave the people, and the people acquiesced. The Roman code was framed and enforced by a people demanding freedom, and the genius of the people went on expanding and improving the law, and altering the machinery to suit their progressive ideas.

The rigidity of rules which in courts first applied to procedure and writs,—where a word of variation or misspelling, or a stammer on the part of a defendant, was sufficient to settle the action, and fatal to the success of the party,[1]—has in later times been applied to the substantive rules of law and rules of evidence, except where legislation interfered. It must often have been felt, before it was said by Lord Chancellor Westbury, that "the rules [of construction] which govern the transmission of property are the creatures of positive law, and when once established and recognised, their justice or injustice in the abstract is of less importance

[1] Pollock and Maitland, ii. 602.

to the community than the fact that the rules themselves shall be constant and invariable." Again, "I am fully sensible of the absurdity of the legal reasoning on which this proposition is founded. . . . The only answer is that the law is so settled."[1] A flexible rule invites persons to disregard it wherever their interests clash. If the rule were to vary with the judge or according to his whim, there would be no guarantee for justice. "Formalism is the twin-born sister of liberty."[2]

We must beware of imagining that all written law is alike. The Twelve Tables, the Prætorian Edict, and the Imperial Constitutions are very different in style and intent. Gibbon ridicules the diffuseness and the florid style of Justinian's Constitution at the commencement of the Digest with its quotation from Homer, but Justinian was not legislating in our sense of the word. He was an emperor solving legal problems and writing an imperial treatise, as Ulpian and Papinian did, as a predecessor played the fiddle, and as a modern representative writes poems, makes speeches, and paints pictures. The man who practises any of these arts must follow the laws of the art like the humblest subject. There is no royal road to distinction. Justinian posed in the character of a scientific, philosophic lawyer, just as he posed in the character of a successful warrior. He did not *make* laws, he expounded law; he had a taste and a sense of justice which led him to appreciate *elegantia*. A neat solution of a knotty problem in law appealed to him in the same way that a neat solution of a geometrical problem does to a mathematician. He was the first lawyer, the first jurisconsult of his age, as he was the great conqueror and general. *Qui facit per alium facit per se.* The triumphs of Belisarius, and Tribonian, his servants, were his very own. He had at least the merit of choosing good servants.[3]

[1] Ralston *v.* Hamilton, 1862, Paterson, H.L.C. 1137. The officially revised report is slightly different, but the words originally spoken seem more forcible.

[2] Von Ihering, *Geist* (5th ed.), ii. p. 471, quoted by Pollock and Maitland, ii, p. 561; Gaius, iv. 11.

[3] *Cf.* Bryce's *Studies in History and Jurisprudence*, ii. 318.

So at the present day the wisdom of a legislator is not a powerful caprice, but a higher kind of judicial skill and instinct which can decide many cases by anticipation in a general rule. The Prætorian Edict was successful legislation, for it was the gradual result of the judicial experience of generations. Kings and rulers have abandoned the attempt to legislate outside of experience. It is the modern well-meaning but ignorant middle-class philanthropist who now attempts to make men sober and virtuous by Act of Parliament.

SECTION VII.—RULES OF PROCEDURE AND EVIDENCE.

Law, we have thus seen, becomes a definite set of rules which law courts enforce in the first instance mainly to regulate their own procedure and the rights of parties in conducting inquiries. We have professional lawyers on the bench—professional, because their right to that position is exclusive.

With the advent of judges there commences a system of simplification and creation of rigid rules known to the judges themselves. It is to facilitate their work that they deal strictly with litigants. They examine titles because this is the most simple and obvious element of a right. It is formalism outside of court procedure, and dealing with what appears to be the substance of the dispute. They shut their eyes to everything else, for cases must be decided somehow, or litigation would be endless. They recognise a few contracts, real or verbal; afterwards they find that literal contracts are also easily proved and then they stop. All the rest are imperfect,—not obligations at all. They resolve questions of right into questions of evidence, questions about facts and intentions into questions of words and their interpretation. It may be suggested that the English doctrine of consideration is the survival of an age when judges were rigidly strict as to proof, or hardly distinguished proof from procedure.

Dickson in the first paragraph of his treatise on *Evidence* combines the various purposes of rules when he says—

"The main object of such rules [is] to exclude valueless and deceptive proofs, to secure regularity in the investigations, and to confine within reasonable limits the duration and expense of judicial proceedings."

We have seen that witnesses are the first representatives of law, for they represent society, as judges and rulers at a later stage represent the organised state and law in a technical sense. In the modern law witnesses survive in all the different forms which they have assumed historically. In early law the witnesses were accusers and executioners, or, on the contrary, persons who by their oaths could exculpate the accused. But when they are treated as merely prejudiced parties who are to speak to facts, of which the court will judge, a new art on the part of judges and other legal practitioners is called into existence—the art of cross-examination.[1] The witness is a human document, difficult to read, but subject to interpretation. The laws of evidence are part of this art.

The modern law of evidence is a system of rules giving in a general form the results of experience as to human nature. In a criminal case a loving husband will lie to save his wife, and we formerly refused to put him into the witness-box. In other cases the temptation is not so strong, and we trust to general honesty, skill in cross-examination, and other evidence. The whole list of presumptions on which courts proceed are maxims of wisdom, handed down by experience—

"Nemo presumitur donare."
"Chirographum apud debitorem presumitur solutum."
"Pater est quem nuptiæ demonstrant."

Each of these is a statement of some fundamental fact of human nature. The recent Criminal Evidence Act was both supported and opposed on the ground of human weakness

[1] See Stephen's *History*, i. 379,432, as to the history of cross-examination.

and frailty. The success or failure of the Act depends on how it is administered. The public reserve to themselves the right of giving a verdict which must confirm that of their representatives, the jury.

The law of evidence is in its conception a body of rules of common sense, a sort of law of nature. Being "common" sense, it is felt that judges cannot safely be allowed to depart from its injunctions. The statements of fact are turned into imperative commands, and the judge is then *bound* to apply those rules. Less injustice is done by making such rules than by leaving the judges free. Such rules as the exclusion of hearsay evidence, and the refusal to receive copies of documents while the originals are extant, both save time and prevent injustice. To sift such evidence would occupy an amount of time out of proportion to its value, and would encourage slovenly methods of prosecution and defence. Juries and judges are not experts in search of truth, but practical men desirous of acting in a matter of serious import to all concerned. The law of evidence is a body of safe working rules, the observance of which is a duty and a law for the protection of material rights. As in all material machinery and engineering works a large margin of strength is demanded in order to ensure safety, so the rules of evidence are designed to minimise the possibility of mistakes in ascertaining facts. Moreover, custom and the feeling of right and duty operate with the parties litigating. The litigant has a right to prove certain facts in certain ways, and has an absolute right to exclude certain evidence—to prevent his adversary proving his case in an irregular way. These ideas were in recent times rigidly applied, for evidence and procedure were not distinguished, until the law of evidence became a scandalous injustice. For the denouncing of these abuses and the pointing out of the way of reform the name of Jeremy Bentham will ever be held in affectionate remembrance by his fellow-countrymen. The long series of Evidence Acts, ending with the Criminal Evidence Act of

1898, appear to make evidence more than ever strict law. This is only in form. In substance they restore the law of nature and common sense. The parties have a right to give evidence, the judge is bound to hear the evidence of the accused, if he tender it. He is not bound to believe it. The absolute exclusion was only rational if the evidence was to be implicitly accepted, or if it was to be regarded as absolutely worthless, and the hearing of it merely a waste of judicial time.

The invention of letters of course alters the idea of evidence. We may see in the sacredness of the Roman literal contract,[1] the survival of an age when all writ was holy. But when the sciences of grammar and logic are invented, these are applied to written documents, and the law of evidence now treats the written as it treats the spoken testimony. It is weighed and tested, and in fact cross-examined, to ascertain what it really does mean. From the ordinary legal textbooks it will be seen how difficult it has again become to separate the substantive law from the law of evidence. These actually coincide when writing is made essential to constitute a contract, as distinguished from merely proving it, as in the case of land rights, bills, and cautionry (suretyship).

Evidence being now a matter of right and duty, and being subject to law,[2] it may be noted further that there is an important analogy between the decision of a jury or a judge on a disputed question of fact, and the decision of a judge or an arbiter on a question of law. The finding in fact, or the verdict of the jury, is an assertion which is consistent with those of all the witnesses, or of some of them, but in the latter case the evidence is harmonised by means of other general assertions as to human nature and the ordinary course of events, and, if necessary, by categorical assertions of the judge or jury that the witnesses are mistaken, prejudiced, or deliberately lying. Thus many trials

[1] Muirhead, *Roman Law*, pp. 419, 430.

[2] *Cf.* p. 173, *supra*.

are resolved into the solution of a dispute as to facts. There may be no dispute as to the law, but as they are decided by the same tribunal, popular philosophy draws no distinction between the processes. The distinction of law and fact is a technical one for practical purposes, because what the lawyer calls laws are bodies of customs and facts to be proved in a particular way by reference to statutes and written and other authorities. In a question of fact the court inquires as to matters of the past; in a question of law it seeks to find a principle or rule which will in future action harmonise both with past experience and with the future so far as it can be anticipated, or altered, if desired, in accordance with some ideal. Titles are both matters of past fact and the grounds of future action in the form of rights or of duties.

SECT. VIII.—MEDICAL "JURISPRUDENCE," ETC.

Medical "jurisprudence" is referred to here, for it illustrates the earlier development of evidence, and its relation to substantive law. In its very name it is an example of the tendency of natural obvious rules of thumb—common sense—to become a technical art. A medical man who applies his mind to medical evidence should be able to deduce the correct inferences from the facts. If a child be killed or die before birth, its lungs will not be inflated. If a left-handed man cut his throat, he will most likely do it differently from a right-handed man. The very conception of this so-called science is a ready set of rules which enable judges, legal practitioners, and medico-legal witnesses to judge of facts. The people who first called it "jurisprudence" had an idea that the rules were analogous to the common-sense maxims which laid down presumptions from psychology and morals, to the effect that men do not generally make donations without reason, that men do not give up documents of debt to the debtor without receiving payment, and that a man will not marry a woman about to give birth to a child unless he is its father.

In various codes, from the Twelve Tables downwards, there have been inserted statements as to the period of human gestation. These are merely a general finding of a scientific fact, and may be erroneous if they proceed on erroneous evidence. But if the fact has been established once it saves trouble and expense to record the result and hold it as fixed. The legislative finding is binding jurally on judges. The legislature may have blundered, but so would every judge, for they all rely on imperfect scientific evidence. It might be thought that the French and the German codes would in many cases work great injustice by the enactment of fixed rules on such matters, but these can only apply in exceptional cases, and the common sense of parties, and the various limitations of the application of the law, mitigate their apparent severity.—(For the Roman laws see Dickson on *Evidence*, 2nd ed., sect. 314: Savigny's *Jural Relations* (*System*, Book ii.), Rattigan's translation, Appendix iii., p. 284: *cf.* French Civil Code, Art. 312, &c.: German Civil Code, Art. 1591-1600, and notes in the French translation of M. Raoul de la Grasserie, p. 341: Glaister, *Medical Jurisprudence, &c.*, p. 275.)

The Roman and the French presumptions as to survivorship (Dickson, sect. 310) are bodies of similar rules, enacted for the purpose of obviating difference of opinion on the bench. If a judicial determination of such problems is necessary it is given once for all, after mature deliberation, by legislation. Such rules save judicial time, and secure uniformity of decision, which is at all events one aspect of justice.

Our modern mode of procedure is to develop the practical medical sciences, and with the help of witnesses skilled in these sciences in all their branches to endeavour to ascertain the facts of a case. The treatment of medical witnesses by lawyers is sometimes thought unfair. Perhaps medical witnesses themselves, instead of confining themselves to facts, draw inferences and state these as the facts. All witnesses

necessarily do this, and are so far judges, but medical witnesses might well be assessors of the court, because the judicial aspect of their interference is more conspicuous. And when we see an eminent physician rudely cross-examined in the witness-box, we must remember that if a judge were removed from the bench, placed in plain clothes in the witness-box, and there requested to defend his legal opinions, he might make even a worse appearance.—(*Cf.* Stephen, *History*, i. 574.)

Again, a skilled mariner will give similar help in determining questions of responsibility for collision or for the stranding of a ship. Thus we might have nautical, agricultural, or architectural "jurisprudence" on the same analogy.

The adoption of the name "Forensic Medicine" in place of "Medical Jurisprudence" by the Scottish University Commissioners is merely a legislative recognition of the change in the mode of regarding the subject which had recommended itself to scientists and lawyers alike.—(Holland, *Jur.* 4.).

SECT. IX.—LEGAL FICTIONS.

The period of early legal forms, and perhaps the force of written law, give rise to legal fictions. This is an early, almost a childish form of invention, though fictions must have been unconscious before they were discovered and were regularly employed. The acceptance of a charmed boundary stone, as equivalent to a wall, may be regarded as an example of this tendency.[1]

If the party to a prehistoric litigation was met with a technical objection which prejudiced his right, his reply might well be—"Oh, I am within the rule in reality if you interpret it properly." And when all parties and the court agreed to wink at the evasion, the institution was established in full working order. But it applied only to individual classes of cases by way of exception. It was a rude form of invention,

[1] Pp. 43 and 221, *supra*.

and a clumsy way of repairing judicial machinery. It operated in two ways. It satisfied the party making a claim, and the court asserting its jurisdiction, partly from its originality and its cleverness, and because it attained the end which they wished to reach. And in an illogical age, or an age where formal reasoning was supreme, even the other party would acquiesce because he could not see a clear answer. The unsuccessful case, too, might be an absurd claim of a description which fell within the letter of a law, but not within its spirit, a claim of which the party himself, as a member of the community, must have disapproved. The traditional trials which have become famous are chiefly remarkable for their childish simplicity. The specimen of the judicial penetration of Solomon, which made him the sage of antiquity, is merely the skill of a man of the world.[1] The Daniel who distinguished himself in the case of Susannah by cross-examining each of two scoundrels as to details in the other's absence, handed down his name, as in a later age the ability to sign one's name might establish a reputation for scholarship. The plea of Portia in the *Merchant of Venice* is a stupid quibble, matched only by the stupidity of the judges in feeling themselves placed in a dilemma. But society felt the essential injustice of the claim, and the crowd (including the court) eagerly seized any means of evasion. In such a soil legal fictions might grow rank and well fulfil their purpose.

SECT. X.—SUBSTANTIVE LEGISLATION.

Although early codes, as we have seen, dealt with procedure, even the first legislation affected substantive rights. It restrained natural rights or powers and put artificial ones in their place. It created exclusive rights of jurisdiction in courts; it created or enforced obligations which might have been evaded.

[1] The case given in the Qur'ân (Palmer II. 52) refers to the equitable amount of damage to be awarded for sheep straying in a field.

Forms of procedure dealing with rights only indirectly must have regulated them, very much in the way that laws, in the form of commands addressed to judges as to *their* conduct on the bench, regulated the rights of the disputants who came before them with cases for decision. A man would hesitate about making an unjust claim if he knew that he would be called upon to handle red-hot iron or boiling lead. Such an "ordeal" is the German "Urtheil"—judgment. The canonical ordeal by oath might be efficacious so long as men believed in supernatural sanctions, or so long as excommunication was a real and painful penalty. When men became too humane to apply the legal ordeals, and too sceptical to believe in the canonical, the modern law of evidence, separated and distinguished from formal procedure, became a necessity.

The ordeals, natural and supernatural, operated in ancient times as a distaste for the expense and anxiety of litigation does in many modern cases. The threat of action—nay, the very possibility of one—keeps some people within the law, makes them hesitate to infringe their neighbour's rights and ready to compromise perhaps unjust claims.

We are perhaps prone to exaggerate the prevalence of custom in primitive communities. No doubt it is in some respects excessively rigid,[1] but in other respects it may be surprisingly unstable. In language, for example, this is the case, where missionaries, after learning a savage dialect, have found it so altered after a few years as to be quite unintelligible. So with law. The forms were no doubt rigid, but the substantive law would be less so. It might indeed be the rough equity of the judge. Like religious prophets, he might always get a new inspiration to carry him over difficult points. As we have seen, codes were an invention which might restrain caprice in this direction.

Now, the mere attempt to express a custom in words, or to write it down, changed its character. While it was still a floating tradition it might more easily be adapted to varying

[1] Grierson, *The Silent Trade*, 66.

circumstances, but a rigid formula called for interpretation, and cases might even occur to which it was entirely inapplicable.

Legal fictions and equity would partially meet the new difficulty; but they involved judicial discretion, which was not always to be trusted. Hence legislation in the modern sense of altering the law. The Austinian theory, which reduced all law to legislation, had to adopt a fiction by which the sovereign really enacted what appeared to be law laid down by a judge. So strong a hold has this theory on English writers that they have called the Philosophy of Law the *Theory of Legislation.* But legislation is only a generalised form of judicial decision, in which the parties and the cases are treated abstractly, and the decree of a legislator, being only the generalised decree of a judge, implies, like the latter, the collision of claims, and the assertion of competing rights. Now both the substance and the form of legislative enactments present difficulties to the politician and the political lawyer, but the greatest difficulties of the jurist are with statutes after they are enacted. Jurisprudence must deal with these, and must draw from the common law legal principles, which no legislature ever thinks of touching, and in fact cannot touch, because they are the fundamental rules of reason.

We have seen (pp. 224, 226) how early codes leave substantive family law to be dealt with by the heads of families, and mercantile law to be settled by merchants or trade guilds. But the State now deals with these, and has often attempted to legislate on subjects apparently remote from government, as when Justinian laid down laws on points of theology (*C. de Sum. Trin.*), and when the French and the German governments issue decrees on points of grammar and spelling. The French decree of 26th February 1901 gives *a right* to spell certain words in a certain way, and material rights flow therefrom. The examiners are the judges, whose conduct is regulated by the decree.

SECT. XI.—LEGISLATION AS TO EXTRAJUDICIAL ACTS.

By establishing courts and legislating for the relations between the judges and the litigants, and between the litigants themselves as such, law was established. But it came to be felt, in course of time, that the courts and the laws had affected rights and perhaps prejudiced them. Further, there might sometimes be an appeal to the legislative power of the State when the legislative and judicial aspects were not fully distinguished. The appeal to the Crown or the House of Lords may be either judicial or legislative, or executive and dispensing, as you choose to classify it.

But, still further, it must have been seen that when men's relations became complicated, litigation—in itself an evil—might be avoided by laying down rules, fixing boundary stones, preserving evidence, and finally by compiling codes and publishing them. This is a further use of the invention of legislation. It may be a general decision on a question often recurring—a hypothetical judgment waiting to be filled with actual fact.

We may adopt a medical figure and say procedure is remedy. Like early medical and surgical treatment, early procedure is rough, and as likely to kill as cure. It is the first department of law which calls for amendment and gives rise to legislation. But excellent procedure is useless if the rules administered in substantive rights are rude, uncouth, and unjust. These in the next place come to be amended by legislation.

But you can go further back, and as medicine becomes prophylactic, law can anticipate disputes and prevent them (*first*) by solemn ceremonies before witnesses, and after the invention of writing, by the careful preparation of deeds (scientific conveyancing); and (*secondly*) by having rules so distinct, so easily ascertained, that people can avoid litigation — they can discover by anticipation the decision of the Court for themselves, or by the trifling

expense of a law adviser. And finally, they may carry on their affairs so skilfully and manage disputes so reasonably, that law appears to vanish, just as medicine and surgery would disappear if men were absolutely healthy and not subject to accidents. As the modern physician attains results by dieting and by allowing nature to work her own cures, so our law shows a decided tendency to allow people to manage their own affairs by making contracts, and by free power of testing (at least in England and Ireland). And we may even follow the parallel further, by pointing out that the crowds who fill the pockets of vendors of quack remedies for their own physical ills, crown with honour the brows of those who supply similar remedies for the ills of the body politic.

There is a tendency to abuse legislation in much the same way as medicine. The reliance on the power of State legislation and the demand for State interference is like the drug-habit; it grows by what it feeds on. Legislation is useful to establish a general rule, where one rule is necessary, or at least expedient. Medicine itself supplies an example. Instead of enacting that a person shall practise medicine or surgery at his peril, and enforcing a strict law of reparation, legislation has now defined the qualifications of medical practitioners, veterinary surgeons, dentists, and chemists. It has laid down a law of drugs in the Pharmacopœia. This is correct, not because Parliament enacted it, or even because the Medical Council drew it up, but because experiment has demonstrated its efficacy. A chemist's apprentice will accept a compound as absolutely correct if it is in his book; a scientist may criticise the book, and question if the compound does its work in all or any cases. To the chemist the Pharmacopœia is law, and he must obey its implied commands. As a citizen and a scientist he may adopt constitutional modes of having it amended. So the qualifications of a medical practitioner are merely a necessary *minimum* of study and experience. A skilled surgeon or physician stands on quite a different platform from the general practitioner,

who may be little better than an old lady who has reared a large family with success, and whose theoretical knowledge is purely traditional. All that an examination board can demand is a legal minimum of attainment—a sort of average established by custom. To look for genius would be absurd, for they might not know it when found.

In all similar cases where the State examines the qualifications of public officials, and grants certificates which confer on them exclusive rights, it is indirectly protecting the rights of private individuals, and it thereby recognises the fact that civil reparation and criminal punishment are inadequate to repair wrongs.

SECT. XII.—PROFESSIONAL LAWYERS.

The establishment of courts and of rigid forms gives rise to the employment of persons skilled in procedure to present a case for a pursuer or defender. At first he may be a patron or protector, a mere agent or representative of the party, like the member of a family or a clerk in his employment, who used to have the sole liberty of appearing for a party in the Scottish Small Debt Courts.—(1 Vict. c. 41, sect. 15.) In course of time law, in the form of legislation, deals with these persons, indirectly restricts their numbers by prescribing their qualifications, and regulates their conduct.—(White on *Solicitors;* Law-Agents Act, 1873; Begg on *Law-Agents.*) The great corporations like the English Inns of Court and the Scottish Faculty of Advocates being autonomous, practically legislate for themselves.

These persons are judicial in a certain sense. They are third parties; they can take a more unbiassed view of the case than a party; they know the law, practice, and precedents of the courts; and if they do not actually advise the party to desist from his claim or succeed in getting their advice accepted, they present the case to the court from a general standpoint, and not from the merely individual position. They try to

reconcile the claim with the general procedure of the court, and show that they may obtain a decision in the client's favour without breaking either the law of the land or the law of the court.

The ordinary solicitor in modern practice may exercise a judicial office in advising his client; and if the client rejects his advice he is merely appealing to another court when he raises a formal action. But the public and judicial side of the legal profession is shown in the extreme power of compromise given by custom to the advocate or barrister in this country. He cannot, like the solicitor, refuse to act for a person who duly fees and instructs him, and accordingly in the conduct of a cause he has a very wide discretion; if he abandons or settles a case, his act is final, and he himself is not responsible to the client for the exercise of his discretion.[1] The reason is, that it is more for the public interest that unnecessary and oppressive litigation should be stopped than that a particular individual should have his full satisfaction of compensation or revenge. It is not incongruous that a class of men, who may occupy the very highest executive and judicial positions, should be invested with such power and such responsibility. If the power be used capriciously, the legal body to which the member belongs may interfere and punish him severely. The power is in practice sparingly used. Any gross abuse would cause an immediate demand for its legislative abolition.

Law having taken a physical form in the person of officials, we may distinguish form and matter in the relation of solicitor and barrister—agent and advocate—and in judge and clerk of court. The solicitor or the clerk of court keeps the forms of process in regular order; but every now and then the forms become material—*e.g.*, when a decree in default is demanded for failure to obtemper an order of court; and again it may be suggested that the solicitor collects the con-

[1] Batchelor *v.* Pattison and Mackersy, 1876, 3 R. 914; but Neale *v.* Gordon-Lennox, 1902, A.C. 465, 18 T.L.R. 791, appears to limit this doctrine.

crete facts—the matter of a case—while the counsel and judge supply the legal form. So a jury deals with material facts and the court with law, but with a perpetual tendency to encroach on each other's domain, the explanation being that law and fact are ultimately indistinguishable.

In modern times law is closely identified with the legal profession. Thus the Kings of England cannot competently sit in their own law courts, except ceremonially.[1] The majority of the House of Lords are laymen, and do not sit as a court of appeal.[2] Hereditary jurisdictions are abolished, and there is a tendency to substitute stipendiary professional magistrates for local justices and bailies. When these sit, they have professional clerks or assessors to advise them; their judgments are generally on trivial matters, and, if serious injustice is done, are subject to review.

SECT. XIII.—INVENTION IN LAW.

We speak frequently of law as machinery. This is more than a metaphor. When a king, who was too lazy or ignorant to judge causes, appointed a judge for that purpose, he not only set up law, in a new sense, independent of himself, but he invented a labour-saving machine. The judge who drew up a code did the same. He invented a machine which saved him the trouble of remembering the law or reasoning it out, and perhaps, best of all, saved him trouble in arguing with litigants.

When law becomes technical, a prudent man will adopt the form of transaction or secure in advance the evidence which in case of dispute will satisfy the courts. Indeed, informality may suggest to the debtor a loophole of escape from his debt. Hence primitive conveyancing. The conveyancer is a man who knows the law and can advise as to the proper form to be adopted to achieve a certain result. To make a

[1] Bla. *Comm.* iii. 41; L.R. 10 Q.B.D. 1 (opening of the New Law Courts).

[2] May's *Parl. Practice*, 10th ed. 340; Appellate Jurisdiction Act, 1876, sect. 5. Any exceptions are irregularities.

will you must adopt certain forms and use certain phrases; it must be attested in a certain way. If you wish to exclude certain heirs, you may do it with ecclesiastical curses, or by cutting them off with a shilling, or by putting them to their election. This is a rudimentary form of invention.

The great historical conveyancers were great inventors. The Aquilian stipulation is a Roman example. So, too, the *Fidei-Commissum* was an important invention; and when Justinian made it the same as a legacy, he was merely doing what other inventors have done, viz., carrying out a small improvement which perfected the machine.

The English doctrine of "uses" is another example. Sir Edward Sugden (Lord St. Leonards) in his work on Powers (p. 3) says:—

"The increasing commerce of the country and consequent necessity of frequent and secret transfers of property; the desire of evading forfeitures for treason; the frauds of the clergy to increase their possessions; the desire so natural to all men of disposing of their property by will—all these circumstances concurred in sharpening men's wits to discover a mode of evading the strictness of the common law, and rendering estates transferable by the secret delivery of a deed, subject to all the capricious dispositions of the owner, as well by act *inter vivos*, as by will. *Uses* were well adapted to answer all these various purposes. They evaded without overturning the common law. The estate was regularly transferred by a common law conveyance to some person as a trustee, and he was at law the absolute owner of the property, so much so that the real owner would have been deemed a trespasser had he entered without the authority, express or implied, of the legal tenant. But in equity the legal tenant and his heirs were by degrees considered the mere nominees of the person by whom the estate was conveyed, and were deemed bound to execute all his directions in regard to the estate."

"After the relation of trustee and *cestui que trust*, or *cestui que use*, as he was then called, was thus established, all the refinements which we now meet with in settlements of real property soon became established *in equity*. Shifting or secondary and springing uses arose."

Then came legislation to remedy defects, and 27 Henry VIII. ch. 10 (the Statute of Uses) was passed.

The English bond is an example of how lawyers will contrive to evade a law by skilful contrivance. Usury was forbidden, and the judges would not award interest, but the

law said nothing about penalties, and so a sum was lent, with a stipulation that, in certain circumstances, double should be paid. The stipulation of a penalty was familiar in ancient Babylonian, Greek, and Roman bonds. So also Ross explains that in the law of Scotland a bond was—

"Sometimes qualified by a separate memorandum bearing that if the debtor paid a sum certain at such a time he should be discharged; if not, the whole became due as damages. This was a sharp abuse of the civil idea of damages and interest, but it answered the purpose. The bond thus taken came to be called double, because [it was] taken for double the sum. If the condition happened to be performed there was an end; if not, it was provided that the bond should stand firm and good."—(*Lectures*, i. 19.)

This was an abuse which was remedied in England by another device, viz., courts of equity. But it is a device which still is used in Scotland, for our ordinary bonds stipulate for a "fifth part further of liquidate penalty in case of failure," which enables the creditor to recover expenses incurred besides his interest.

But invention is always in progress, and generally for the evasion of some inconvenient legal rule. There have been devices by Scots lawyers to give creditors a security over a lease by making the debtor hold and manage the farm for them while he is sole tenant.—(1 Bell's *Com.* 76.) We have the numerous devices to give securities over moveables without the possession demanded by law—sale by the owner and re-hiring to him to account for his possession.—(*Orr's Trustee* v. *Tullis*, 1870, 8 M. 936; Gloag and Irvine, *Rights in Security*, chap. vii.; *Duncanson*, 8 R. 563.)

Then legislation intervenes with such statutes as the Scottish Registration of Long Leases Act, and the English Bills of Sale Acts, which instituted registration. The interests of numerous creditors are the interests of "the public."

But still older devices, like distress and hypothec, were at one time inventions, whose origin is lost in antiquity. They were used instinctively or discovered accidentally, like the simple mechanical powers. The important mercantile

invention of *crossed* cheques may be regarded as an accidental discovery.

It has recently been observed that juries have unconsciously modified the law in England, *e.g.*, by giving exemplary damages penalising adultery although it is not technically a crime.

Even the practitioner in his daily practice must exercise some inventive power, though on a small scale, to adapt his forms to varying circumstances. There may be a complicated tangle of business created by stupidity and negligence, or a complicated fraud difficult to unravel. One remedy may be better than another, in order to bring a fraudulent opponent to his knees.

New laws suggest new inventions for their evasion. The lowering of the political franchise caused the invention of "faggot" votes by those who possessed property. The desire to evade responsibility for maritime losses has led to the invention of "one-ship companies." The shutting of lawful public-houses on Sunday in Scotland has opened large numbers of social clubs for the main purpose of drinking on Sundays.—(14 *Jur. Rev.* p. 59).

It may be supposed that if laws are merely a mechanical device it will matter little by whom the invention is introduced. But this is not so. Legislators have discovered that if a people imagines that it legislates for itself the laws will be more readily obeyed and more easily enforced. A man will put up with a machine or an ugly work of art if he made it himself. This applies to laws as well as to paintings or poems. If he knows that by certain means he can get it altered he will endure it in the meantime, and may even come to approve of it. When a man invents a new political device he must publish and advertise it. If it is adopted it may succeed, but the probability is that, like most mechanical devices, it will be found unworkable; another may discover it or introduce it successfully and reap all the glory and any profit which may accrue.

Invention deals with rights and duties as well as laws. We have natural rights and artificial rights, natural duties and artificial duties, and natural laws and artificial laws. It is the invention of the artificial that leads to the discovery of the natural. Before scientific engineering raised road-making to an art men preferred level to hilly roads, followed dry ridges in preference to marshy hollows, and climbed hills by way of water-courses. Some roads instinctively taken by men and animals are as natural as the channels taken by the streams. Modern roads differ in degree, not in kind. They do a little more in making conditions rather than in accepting and avoiding them. So the examples given above, the Bond, the *Fidei-Commissum*, the Use, the Ground-annual, are examples of artificial rights and artificial obligations. We cannot draw a rigid line between the natural and the artificial. They are continuous.

The recognition by the State and society in law in its natural form is unorganised sympathy, lynch law, mob law, and such-like. A tribunal, a judge, is artificial. So are laws as to witnesses, ordeals, and trials. Then comes legislation—publication of rules in anticipation.

The acceptance of written evidence, bonds, and deeds is natural or artificial as you choose to look at it, but it goes further, when the State holds out a promise to recognise transactions if registered, and then finally treats all others as null. Patents, shipping registration, bills of sale, and in Scotland and partially in England registration of conveyances of land, are all examples. The mechanical formality of special forms of conveyance and of registration simplifies evidence and relieves the law courts of tedious investigations as to titles. At first there may be some injustice in refusing to recognise natural equitable transactions, but the public convenience of the new system is overwhelming, even before the forms become natural, as they ultimately do. When we find the forms cumbrous we simplify or abolish them, but this may cause trouble in litigation by compelling parties to have recourse

to the law courts to determine their validity. For example, the appearance of type-written deeds raised doubts as to their validity in the minds of some conservative practitioners.

We may note also the extension of judicial forms to extrajudicial acts. The Roman forms of bequeathing a legacy, the words being judicial, afford an ancient example. The process in Scotland of registering a bond or the protest of a bill of exchange, and so transforming it into a decree of court, may be taken as a modern example.

SECT. XIV.—EXTENSION OF LEGAL FORMS BY ANALOGY.

When the machinery of judicial investigation and legislation has once been invented its application to other purposes follows almost as a matter of course. We shall see this hereafter in the use of the term "Justice" by the Greeks.

The chairman of a meeting, the Speaker of the House of Commons, and all such persons, have *quasi*-judicial functions. Their conduct is not approved if it is capricious or malicious. They are criticised, and in most cases may be removed by the meeting if their conduct is unsatisfactory, and in general are expected and always hold themselves bound to follow a vague general idea of the duty of a chairman.[1] This may often result in doing their best and keeping fair order. It will be observed that the laws dealing with the duties of a chairman have developed in the same manner as ordinary laws. First they are temporary and judicial; then they become legislative, and are codified in the form of "standing orders," the rules being partly natural (common law) and partly artificial. The chairman is a person with rights involved in his duties, and in at least one case he has become absolutely autocratic —that is, the chairman of a meeting of the General Council of a Scottish University (Ordinance No. 59, Report 1900). In other cases, where a chairman has or is supposed to have autocratic power and authority, it is due to the fact that

[1] Prof. W. R. Herkless in *Scottish Review*, vol. 26, p. 321.

formal order is of more importance than substantive justice. In small matters such a chairman is a court of final jurisdiction.—(*Cf.* pp. 315, 338, 361, &c., *infra.*)

When an issue can be stated in words it becomes easy to have a *quasi*-judicial investigation. The Private Bill Procedure of Parliament has now got its own laws—standing orders; it has judges, counsel, solicitors, and witnesses like a court. Its substantive law is not so rigid as that of private right; it must follow a looser equity, but still it has some law or right which it ought to follow, which it is expected to follow, and as a rule does follow. If the members passed a bill because they were bribed, or to fill their own pockets with profits, they would be condemned by public opinion and expelled from public life, if they were not impeached in Parliament itself. But even in their ordinary work there is the idea of right. A large town may fairly claim to be placed on the main line of a railway. A smaller town on the straight line and direct route may claim to have a right to the new railway against a larger town some distance off. Then the termini may have claims and rights as against these towns. The committee decides these claims of right, and there is a true *law* as between the claimants, though it is not and cannot be expressed in a formal code.[1]

Board of Trade enquiries into the loss of ships deal with the moral characters of masters and seamen, and now there is a formal appeal allowed to the higher Courts.[2] A manifestly unjust decision might be revised by public opinion and Parliament itself. A court-martial may be put into the form of the trial of a person accused of a crime when the real object is a formal inquiry into the whole circumstances of a naval or military disaster. Many trials in Scotland for culpable homicide (manslaughter) are public inquiries put into this form, since there are no coroners' inquests in this country.

The Parnell Commission and the South African Com-

[1] *Cf.* Crozier, *Intellectual Development*, iii. 333.

[2] See Merchant Shipping Act, 1894, sect. 490. A scientific referee has "the same powers as a judge of the court of survey."

mittee are examples of an extension of the principle into the sphere of politics. To a law-abiding people the form of a fair trial by skilled and fair-minded men is sufficient. The general body cannot weigh evidence, cannot in fact hear it all, but if we give the accusers and the accused a fair hearing by a jury, the public will be satisfied with the verdict *ut sit finis litium.* Disputes may be entertaining and exciting for a little; after a while they grow tiresome, and though at first we were disposed to listen and decide the point, it was chiefly for the purpose of restoring peace. If we cannot do this we drive the disputants in disgust and weariness from the judgment seat. Antiquarians and philosophers may carry on disputes through ages, for their methods are slow, and as a general rule, when the question is answered, we find there was really no question to answer.

The most interesting recent development of legal forms and machinery is in the domain of economics. Labour flows naturally to the best market, and if individuals were free wages would adjust themselves and find their level as certainly as water. But labour is not a perfect fluid, and it takes a long time to adjust changes, or they may be sudden and calamitous. Conscious art steps in as it does in agriculture to regulate water supply either by drainage or irrigation works. In the State these take all the forms of judicial decision and legislation. In early times we have arbitrary decrees of kings or oligarchies regulating prices and wages. At the present day we have an imitation of Parliament or Congress consisting of representatives of the conflicting parties attempting to make contracts or to legislate for the whole body of employers and workmen. There are two Houses, Lords and Commons, Employers and Workmen, and they bargain as men once bargained with the King for removal of grievances in consideration of ε money grant. And in some cases the Trade Unions come back finally to votes of the whole bodies, as the people once did in England, and still do in the small Swiss Cantons. Quasi-judicial pro-

cedure for the prevention as well as for the settlement of disputes is contemplated by the Conciliation Act, 1896. In New Zealand and Australia, by adopting the principle of compulsory arbitration, the experiment is being tried of making labour disputes entirely subject to law. Not only are forms of procedure laid down, but a kind of substantive law is indicated. This law is intended to be a practical working rule. As Mr. Reeves observes in his *State Experiments in Australia and New Zealand* (ii. 169), "the business of a labour arbitrator is not to please orthodox professors of economy, but to find a reasonable *modus vivendi* for two disputants who are unable to find it for themselves."—(14 *Jur. Rev.* 394.) This system is condemned by some authorities as impracticable.—(Reeves, *op. cit.* ii. 69.) There are subjects physically too large for law in artificial forms.

Another example may be added.[1] Under the Acts for the granting of licences for the sale of intoxicating liquors, "an extensive power is confided to the justices, in their capacity as justices, to be exercised judicially; and "discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, And it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself" (*per* Lord Halsbury, L.C., in *Sharp* v. *Wakefield,* 1891, A.C. at p. 179). The power or capacity of the justices is a jurisdiction.—(*Cf.* p. 112, *supra.*) The licence granted is treated by the law as a right—a property within certain limits and for certain purposes (p. 102, *supra*). Death duties, for example, are exacted for goodwill, on the assumption that the licence will be renewed. In licensing procedure it is treated as a vested right. But in recent times the justices in many districts have attempted, like the

[1] *Cf.* also the Court of Claims,—Wollaston, *Coronation of King Edward VII.*

Roman prætors, to legislate by announcing beforehand what policy they intend to adopt. If their ideals are legal, as explained in *Sharp* v. *Wakefield*, no harm will ensue. But the ideal is generally absolute prohibition or rigid restriction of the traffic, and might in other cases be free trade. This usurpation of authority and abuse of jurisdiction were condemned by the Lord Chancellor in a speech in the House of Lords on 16th March 1903. It may be asked in what capacity did his Lordship deliver this speech—as a legislator, a member of the Supreme Court of Appeal, or as a member of the executive? The procedure of the licensing authorities and the speech of the Lord Chancellor illustrate (1) the ultimate identity of jurisdiction and legislation; (2) that legislation is not in many cases conveniently represented as a command; and (3) the gradation of ideals, to which reference will be made in the following chapter.

SECT. XV.—POLICE LAWS.

The first attempts at systematic law-making were the regulation of natural relations—judge and litigants—debtor and creditor—master and slave—parent and child—husband and wife; but as society becomes more artificial, the rules regulating rights and their collisions—the machinery to reduce friction between men—assume a still more artificial aspect. The first rules were so obvious and simple that they may be called laws of nature; but when men are crowded into mines and factories, and live in layers—in storeys one above the other—and in densely packed buildings, it becomes difficult to know exactly what to do, even with the most honest intentions; it is difficult to know what to expect from one's neighbours; and it is almost impossible to judge between parties in such circumstances. If A. keeps his rubbish in his own house it becomes a nuisance; if he puts it on B.'s ground it is a nuisance to B.; if he throws it on the street it is a nuisance to everybody.

He can neither keep it nor get rid of it. Thus we reach police laws for an artificial society—the hundreds of sections of our modern police statutes. And we now abandon law in the sense of compelling the citizens to perform these specific duties, and adopt the plan of joint action for cleansing, lighting, and water supply. Formerly the corporation compelled individuals to undertake these duties. The corporation now undertakes the duty and commutes the duty of the citizens into one of paying rates. If the duty is neglected, the citizen now complains. The change is economic and social, but legislation and judicial machinery naturally adjust themselves to men's changed ideas.

Legislation is necessary when the knowledge which determines conduct is recondite. And as early legislation created judges—special persons with exclusive rights of jurisdiction, so our modern legislation creates police and inspectors—special artificial persons to represent the community and enforce special obligations. The obligations are specially created, for they are not obvious—*e.g.*, to report infectious diseases and remove the patient to some place where he will not infect the community.

Many police rules—*e.g.*, forbidding passengers to cross railway lines—are rules of caution. Most might cross safely; but if the practice were general accidents would be frequent. By absolutely forbidding the act and making the act itself a *quasi*-crime, the safety of a few members of the public who are neither prudent enough nor nimble enough to perform the feat without running a serious risk, is practically insured against their own negligence.

Furious driving in the street is another example, but the right of driving motor cars at the speed of railway trains is limited not so much for the safety of the drivers as for that of the average slow-witted members of the public, who are also entitled to use the roads. Reparation for damages is an imperfect remedy, and is too late. Prevention is better than cure.

Another recent extension of police law will be found in bye-laws of some corporations, where a limited summary jurisdiction is conferred on the drivers and conductors of tramway cars; failure to enforce this jurisdiction is itself a breach of the bye-laws.—(*London Gazette*, 27th March 1903.)[1]

All these rules are laws which make rights and obligations; but it is absurd to assimilate all law to this type, when even police regulations, if rational and tolerable, can be explained by the fact that man is a rational being, who recognises rights in his neighbour or claims duties from him, and who has made laws for the regulation of these. The smallest police regulation is unintelligible but for the prior existence of rights of person and property, and ethical aims of society.

SECT. XVI.—PROPHYLACTIC LAW.

It may be remarked here that the preventive character of legal machinery is much wider than our police statutes. We noticed it in the Conciliation Act, 1896 (p. 251). We have seen it in the adoption of general findings as to fact, for the purpose of saving the time of the courts and sparing expense and trouble to the parties (pp. 231-234). It may be seen in such regulations as section 5 of the Judicial Factors Act (12 and 13 Vict., c. 51), which forbids a factor to keep in his hands more than £50 for more than ten days. It may be seen in the refusal to recognise speculative investments by trustees, and in their responsibility if they allow a factor or an agent to take investments in his own name. In ninety cases the investment may be safe and remunerative; but in the other ten it is disastrous, and the trustees therefore take it at their own risk. The factor may be an honourable man, and an honest man, but men as honourable and as honest have succumbed to temptation, and it is the duty of trustees to insist on rigid legality in working the machinery of a trust. "Formalism is the twin-born sister of liberty."

[1] P. 273, *infra*, Note.

The lawyer or factor who feels aggrieved if he is reminded of his duty in this respect has mistaken his profession. The law is framed to prevent the discussion of questions of discretion.

But beyond this, what we have called "prophylactic law," which anticipates infringement of right or breach of duty, we have attempts to assist humanity or improve men's character by creating artificial rights and duties. The poor law, public health, education, and other laws are examples where rights to sustenance, amusement, and instruction are conferred upon the public at large, and where acts otherwise innocent are sometimes punished as crimes.

We may also regard private deeds as anticipating and preventing disputes not merely by preserving evidence of facts, but by creating special rights and duties—artificial, like the artificial crimes created by police statutes. Thus the preamble of old wills ran that they were to prevent disputes after the testator's death. Contracts, such as of copartnery, are a private code of law to prevent disputes. The parties have discussed their claims, and recorded the result in this act or decree. In the schedules of the Conveyancing Acts, the Companies Acts, and others, Parliament has drawn up laws in the form of private deeds, which parties may adopt or modify. And in the codes of rules drawn up by the International Law Association as to general average and insurance (p. 310, *infra*), we have a body of carefully considered decisions as to what ought to be the rights of parties concerned in these transactions. They might refer disputes to the decision of arbiters; but, better still, they adopt the rules of the Association and make them expressly a matter of agreement.

SECT. XVII.—DISTURBING EFFECT OF LEGISLATION.

Many of the examples given show legislation to be a disturbing element. It disturbs the general public as well as the individuals directly interested. It may provoke a re-

action or oscillation of the moving body, or, again adopting a medical figure, a general irritation and inflammation. Some are opposed to the law in principle; some have material interests diametrically opposed to it; these interpret the law strictly, and try to make it if possible a dead letter, as with usury and other laws (pp. 244, 246, *supra*). Others approve of its provisions, and perhaps desired much wider legislation; these attempt to expand the law by interpretation (p. 251). Judges are not mere logical machines; they even display the passions of the crowd, though in an attenuated form. Thus there have always been Sabinians and Proculians among the practitioners or administrators of the law. There must have been radical as well as conservative prætors.

A good example of the disturbing effect of legislation is the window tax, though in point of fact every tax has a similar effect. This tax operated as a sanction on having too many windows. People who preferred daylight and air to darkness and evil smells were fined and punished. The legislature had blundered in fixing on this criterion of wealth and were compelled to abandon it, finding another in the rent paid for the house.

Look at the revolutions in trade caused by changes in tariffs. This is a well-recognised device adopted for political ends, as in protective tariffs; or for moral ends, in sumptuary legislation, and taxes on alcohol, tobacco, and other luxuries.

Another example is the transformation of the Zemindars in India, who merely collected a land tax and handed it to the Government, into feudal proprietors of the land. To a careless observer the things are the same; essentially they are absolutely different.—(Baden Powell's *Village Communities in India*,[1] pp. 144-146.)

It was in the interests of agriculture that the teinds in Scotland were made a tax rather than a property, when the parson could demand in kind each tenth sheaf.—(Buchanan on *Teinds*, p. 16.)

[1] See a similar case in New Zealand—*Journal of Comp. Legislation*, N.S. 1900, p. 451.

This might be illustrated from every Act of Parliament, so much so that Austin, Hearn, and others define rights as springing only from laws, which, it must be remembered, with them mean statutes, for they resolve all law into statute. Rights, however, are both causes and effects of laws in various senses—natural and artificial.

The blunders of the Legislature in dealing with the competition in Scotland between the trustee in bankruptcy and creditors attaching moveable goods by a "poinding of the ground," are an excellent illustration.—(Goudy on *Bankruptcy*, 3rd ed. p. 269.) By common law (custom) the poinding creditors were preferred. In 1839 an Act was passed restricting their rights, and this was re-enacted by the 118th section of the Bankruptcy Act, 1856. This section was repealed—it is thought inadvertently—by the Conveyancing Act of 1874; and from that date heritable creditors enjoyed the rights accorded to creditors before 1839. But in 1879 an Act was passed re-enacting the restriction introduced in 1839.

In Ireland in the Land Courts, and in Scotland in the Crofters Commission, we have a judicial analogy. The judges try to decide what is a fair rent. In spite of themselves they set up precedents and give rise to expectations. If they reduce rents in one parish and not in another there is a feeling of injustice in the breasts of the tenants; if they reduce the rents of a landlord who spends all his income on improvements to the same level as those of his neighbour, who spends all his at Continental watering-places, there is a feeling of injustice in the breast of the former. The mere approach of the Commission, like a comet to a planet, disturbs legal relations, and perhaps stops the very desire to fulfil legal obligations. Perhaps the disease called for such a remedy; it may well be asked if life is worth living that requires such treatment. It may be noticed again that Parliament did not define "fair rent." They set up a court. This is the primitive mode of dealing with substantive law,

and illustrates how rules for the regulation of rights may be evolved prior to the era of legislation.[1]

How truly a judicial decision in Great Britain is legislative in its character is shown by the anxious deliberation with which the decision is given and the consternation caused by it in some quarters.[2]

The danger of over-legislation, as we have already observed, is like the danger of over-drugging. In attempting to alleviate or cure a small evil, we may cause a greater. Excessive interference with the laws of nature causes functional disturbance.

SECT. XVIII.—SANCTION.

We have applied the term law to the aspect of right and duty looked at by society. In the case of law, as in right and duty, there is an intellectual as well as a physical side. The physical is an embodiment of the intellectual; and the intellectual informs, creates, modifies and expands, and changes the physical. The theory of sanctions is only one side of their physical aspect.

The idea of sanction runs parallel with the development of law. It is first suggested by the actual doom pronounced by the priest or judge on the wrongdoer. He is *sacer*—devoted to the gods below, an outlaw, an outcast—and any one may kill him like Cain.[3] Then sanctity is extended to things like the boundary stones (pp. 38, 153, *supra*). They are *res sacræ*—*res sanctæ*—property. Then, in the third place, the abstract notion of sanction is associated with the threats of such a doom, which accompany legislation. This is the narrow meaning adopted by Austin, who failed to see that

[1] An example of legislation by arbitration will be found in the proceedings between the Home Office and the workers in the potteries, in which Lord James of Hereford was arbiter.—(*Times*, 19th Nov. 1901, p. 12.)

[2] *E.g.*, Allen *v.* Flood, p. 137, *supra*; Taff Vale Railway Co. *v.* The Amalgamated Society of Railway Servants, 1901, A.C. 426.

[3] *Cf.* von Ihering, *Geist des r.R.*, 5th ed. i. 279; Moulenære, i. 280; Muirhead, *Rom. Law*, 2nd ed. 17.

legislation, to which he reduced all law, was only, as Hobbes held it to be, a generalised judgment. And lastly, from being associated with prohibition, sanction comes to mean authority and approval—a positive as opposed to a negative idea, as when we apply to the Court to sanction some transaction, or when a private individual sanctions an act extra-judicially. It is then applied to a right. Sanction is, in short, generally and primarily the physical form of State approval and interference (p. 124, *supra*).

It was shown at the outset that force is the necessary physical foundation of rights and of law. But we never find force, pure and simple, in human relations, for man is self-conscious and rational. A man kills an animal that he may take its skin for clothing or its flesh for food. Another kills a man for food or to rob him. The civilised highwayman gives the victim a chance of voluntarily surrendering his purse and jewels. The victim may respond by killing his assailant or by taking him prisoner. The natural right of the victim creates a rudimentary natural duty in the robber. In all these cases there are rational ends of some kind. When society interferes it also is composed of rational beings with a common end. They deal with physical forces—the weather, storms, and earthquakes—by evasion or prevention. Violent men are another kind of physical force, like wild beasts; and it is immaterial for many purposes that the acts are wilful and have some purpose. Society may and in some cases does actually exterminate savages and robbers. In other cases it creates an artificial motive for respecting the rights of others. This is what lawyers call a sanction—artificial in the same sense as laws are artificial. But as society progresses, the law-abiding class becomes a strong majority, who for themselves adopt the common ends of society. Sanctions then come to deal only with the criminal classes on the margin between the organised State and savagery.

When the accused is truly a member of the society, and

feels himself to be such, he may inflict a penalty on himself or be allowed to do so by the law, as in Japan. On a small scale, this is seen in the irregular practice which prevails in some towns in Scotland, where the police allow an accused to bail himself for an amount equal to the fine which the magistrate would probably impose. If the accused fail to appear, his bail is forfeited, but it is only in serious cases that a new warrant for his apprehension is issued. The sanction in such cases works extrajudicially.

In its first wide aspect we may conceive the public interest and sympathy to express itself in mob law, lynch law, unorganised sympathy, or detestation expressed in words, gestures, and rude acts of violence. The particular form of violence is of less importance than the meaning it conveys. (But the sanctions of some systems, like the language of some people, may be out of all proportion to the subject dealt with.)

With or after the genesis of the State we have the creation of judges—at first temporary for each case—arbiters, then for classes of cases or for a period; and lastly professional. The judge and the *forum*, the King's *court*, are a physical embodiment and symbol of law. Hence the phrases *in jus vocare* and *go to law* have a double reference, and may mean only to litigate in court, or to obtain justice.

The rise of a legal profession in and outside of the courts is a further embodiment of law as we have already noticed. We see the influence of law in the immense extension of the extrajudicial practice of the legal profession. We see it in every legal transaction. Thus if a man wishes to make a will he may do so, and leave his relatives to fight before the courts to reconcile his wishes with their claims, and with the traditions and public policy of the society in which he lived. If he goes to a Scots conveyancer, he is told he cannot disinherit his children entirely; he cannot leave his wife unprovided for; he cannot tie up his property indefinitely; he cannot endow certain corporations out of land; he must pro-

vide for certain duties to the State. And if he indignantly asks why a man cannot do as he likes with his own, our conveyancer, if he knows, may give him some archæological information about ancestor-worship among the Romans, the history of Mr. Thellusson, Mortmain in England, decisions on wills in England and elsewhere. In a word, the law, in this physical form, is as real as the language, which he must use if he is to be intelligible. He may call his feelings rights, or he may regard them as duties; an outsider might well say that all the powers and restrictions thereon which we have just described are created and imposed by society itself.

But, still further, society formulates and expresses its sympathy and its interest in the relations of men in a physical form. The State legislates, lays down rules for the regulation of rights, for the settlement of disputes, and for the creation of artificial relations to carry out human moral ideals. It regulates and apportions revenge and calls it punishment, it sees to its execution, so that some can now plausibly deny that there is any idea of revenge; and now we find punishment, since criminals are comparatively few and harmless, made or attempted to be made entirely reformatory. That is to say in the criminal as in the civil law the State attempts to deal extrajudicially with the illegal acts at an earlier stage than that of revenge and punishment.

A sanction is an artificial form of the expression of the approval or disapproval of the State as distinguished from the natural and instinctive forms adopted by societies imperfectly organised. Ulpian seems to have dealt with this topic at the commencement of his *Regulæ*. The passage, as restored by Muirhead (*Gaius*, 359), runs :—

> "A statute is either perfect, or imperfect, or short of perfect. It is perfect when it forbids something to be done and if done rescinds it; . . . that is imperfect which forbids a thing, yet if it be done neither rescinds it nor imposes a penalty on the contravener. . . Short of perfect is that which forbids a thing, and if it be done does not rescind it, but imposes a penalty on the contravener."

This distinction is like that of perfect and imperfect rights and obligations (p. 191, *supra*). But in our law the imposition of a penalty implies prohibition, and, if possible, annulment.—(Maxwell on *Statutes*, 3rd ed. p. 297.)

In the stage at which we have arrived in the present day we find a reign of law. Society by mere force of habit has again taken into its hands the enforcement of rights and duties by force of public opinion. Men fulfil their duties and obey the law by force of habit, or from fear of losing the good opinion of their neighbours. The jail and war are kept in the background, as behind them there is a residuum of brute force which could fight out civilisation again if required. To men whose only aim is to enjoy life in its most animal form, in its very lowest terms, you cannot appeal except by taking this life from them. The only value of such a life to society is that it can be taken as a means of terrifying by example others who are cowardly as well as brutal. But the voluntary, though it may be sullen and unwilling, submission to law begins again. It is the rationality and the morality of human society that are behind the captain's revolver when his crew get drunk and mutiny during a shipwreck. In Galveston, after the great disaster of September 1900, martial law was proclaimed. Large numbers of negroes were shot for plundering and for refusing to assist in clearing the city.[1] The authorities represented reason, law, and society.

This new force is natural and physical; it finds an embodiment in literature, the press, the pulpit, social clubs, and general society. The minority, who do not read and belong to no church and no club, are dealt with by the police, subject to the criticism and directions of the rest of society.

This physical embodiment of law is much wider than the idea of sanction. When it is pointed out that as trade and commerce increase litigation is decreasing; that while judges

[1] *Cf.* a similar account of the plague in Athens,—Thucydides, ii. 53. "*θεῶν δὲ φόβος ἢ ἀνθρώπων νόμος οὐδεὶς ἀπεῖργε, κ.τ.λ.*"

are becoming more lenient, serious crime is decreasing, the usual answer is to give a new definition of sanction, or to maintain that it is still in the background; but the truth rather is that society is becoming educated, and what once was done with pain and effort is now done instinctively—is now natural. A whip may be required for a dog at first, while a word will suffice afterwards.

Sanction attracts attention early as a reaction against wrong, as an early matter of regulation. But, prior to wrong, there was the physical energy which created and claimed rights—the rights that by excess became wrongs, and so demanded regulation in the form of law. The original right was met by the similar right in one's neighbour, by the right to redress, to revenge, and, in the State and society, the right to punish. Sanction could not have existed, unless men had first felt and claimed rights, and had expressed these claims in a physical form through their bodily energy, and other men against whom these claims were made as obligations or duties, had physically resisted the claims, and asserted inconsistent claims as rights in their own persons. Sanction is the physical reaction of the State or society against the physical assertion of power by the individual.

In one aspect law is the very antithesis of sanction. One of the first subjects with which law deals by way of regulation and moderation is this ruthless self-help and distress. Constitutional law is the regulation of the prerogative and power of taxation; international law takes its rise in attempts to regulate violence. The self-assertion of the individual, the assertion of his rights, is the preliminary postulate of law. The primitive political tyrant or domestic or private bully attains an end, but law shows a more excellent way. As Adam Smith proved how the wealth of nations sprang not from excessive taxation and restrictive legislation on trade, but from the freedom of the private trader, so modern legislators have discovered that peace may be kept among men by freedom, by removing disabilities, by extending means of

attaining health and comfort, by rapid and just settlement of disputes, and not by hanging and quartering or imprisonment. Physical force is still in the background. Society may lapse from civilisation back to savagery. Rude laws, with rude sanctions, will deal with the assertion of rude rights, and enforce rude obligations. But if man is more than a mere animal he may be led by fellow-men to raise himself to a higher level of civilisation. And the same conscious legislation which regulated this violence makes legislative rules which keep the peace more efficaciously with rational self-conscious beings, who can re-enact the rules for themselves in their own consciousness, than all the hired ruffians clothed in livery that a king can afford to pay.

SECT. XIX.—LAW AND THE STATE.

To define law as a command is a fallacy refuted by the facts of history, for, as we have seen, it practically defines all law as legislation. But legislation, like the social contract, implies a common law behind it, and ideas of justice whereby we may interpret the statutes of the legislator. This definition implied that law begins with the State, and was a natural mistake for lawyers to make, who, with their predecessors for centuries, had belonged to a highly developed and centralised government, organised on a military model.[1]

But we might as well define a railway as a Government road and means of communication, if railways happened to be owned by the State. There were roads before the king's highway. If we deny the existence of law before the State, we must also deny the existence of the State before the law. We have here the old egg-and-hen puzzle over again. In early times you have germs of both. You have the oppression of people called serfs or vassals by a man called a chief. The vassals rise in rebellion and limit his power; they issue,

[1] Professor Holland's chapter on "the Application of Law," in his *Jurisprudence* is merely a logical result of this definition of law.

if you choose to put it so, a command with a sanction, and make an embryo state. Law may well begin with the king, for he first has rights which are claimed by him, submitted to, sanctioned, and so far approved by his subjects. And the fear of assassination and rebellion must have brought home to many tyrants the fact that the performance of something like duties was incumbent on them. The doctrine of the divine right of kings confused Government and private property, but the rights of kings are truly divine as against anarchy.

The identification of law with the State is like the identification of Church and State, or religion and the State; but law has become so thoroughly "Erastianised," that most people cannot separate them, and many deny that they can be separated. But this separation was an actual fact in Roman law in the days when the jurisconsults flourished,[1] as it is at the present day wherever freedom of contract is recognised, and where legislation is carried on upon purely democratic lines. The people (the State) use the Government (the State) as a machine for their own purposes. But law and the State were also distinguished in the Middle Ages when the Glossators expounded the law for courts. And on the Continent at the present hour, through the influence of "jurisprudence," great jurists may profoundly affect the law in the same way as great chancellors or great presidents in our own country.[2] The legislature must take for granted the whole body of national feelings, prejudices, and customs, just as it adopts the popular language. Law, like language, springs from the society itself, and one of its first works is the creation of the State—the greatest of corporations—for the enforcement of rights and duties in accordance with law. The State makes laws but does not create law, just as it may manufacture gunpowder, but does not create chemical relations.

[1] See article on Papinian by Professor E. C. Clark, in the *Journal of Comparative Legislation*, N.S. 1902, at pp. 23 and foll.

[2] See Ilbert, *Legislative Methods*, p. 208.

SECT. XX.—VALIDITY.

Validity, like sanction, refers to force, and that originally in a physical form. It might have been noticed appropriately along with "competency" (p. 55) as an aspect of right. We have discussed power and faculty as aspects of right, and also the double aspect of force in connection with obligation (pp. 139-157). Validity is not mere force, it is legal, just force. *Vis* is used for illegal force, though the plural *vires* is applied to faculties, powers, &c., as in the phrase *ultra vires*.—(Brissonius, Calvinus, *s.v.*) *Vis* and *validus* are associated in the line of Vergil—

> "Neu patriæ validas in viscera vertite vires."
>
> (*Æneid*, vi. 833.)

We speak of a plea prevailing—*valet*. The usage is Roman.—(Ll. 4 pr.; 7, §§ 13, 15; 46 D. *de Pactis* (2, 14).) The first idea is that the Court makes a claim valid by interposing its authority. A valid decree is one which the superior courts will not set aside or suspend. But we then apply the term to the claim or the obligation by anticipation. They are valid because the Court will give them force. The style of the Scots summons of reduction runs that the pretended deed or writing should be declared to be "null and void, and of no *avail*, force, strength, or effect in judgment or outwith the same in time coming." And so we speak of valid rights (such as patents), valid deeds, valid obligations, and of a person being *valens agere* (Ersk. *Inst.* iii. 7, 37) when, from age, being under no legal disability, or from position, as being in this country and enjoying freedom, he is able to act in the defence of his rights.—(*Cf.* "Capacity," p. 71, *supra*.)

But when it was seen that the force of the State must not be arbitrarily put at the disposal of individuals, it was found that justice demanded that there should be some intrinsic force or virtue in the persons or things dealt with. The usages are popular rather than legal. *Valour* is force—a virtue which resides in persons. *Value* is a goodness for

some purpose which is supposed to inhere in things. It is the fact of things having a value (in an economic sense) that gives rise to interest (in a legal sense). If things have no value law will ignore them.

Value is thus a special case of validity. It is validity for a certain purpose—a special kind of interest. Here jurisprudence touches economics, which is in one aspect the science of value for purposes of exchange and market. This is well illustrated by the use of the word "good," which may apply to men, or to the *summum bonum*, or to merchandise—things.[1]

SECT. XXI.—THE CRIMINAL LAW.

In modern practice the State keeps in its own hands the department of the criminal law, and it is commonly said that crime is distinguished from civil injury, in so far as the former is an offence against the State as well as against an individual, while the latter concerns chiefly the private individual. But this distinction must give way to criticism. The refusal to pay a private debt may be a greater wrong to society than many a petty theft, which in point of fact may only affect an individual, and that slightly. The fraudulent company promoter may not be technically a criminal, but may injure the public more than a burglar. But the history of procedure and of government explains the present distinctions of the law. We may represent a criminal process as a collision between a person asking revenge—the right to punish, and another demanding his right to liberty. The criminal may be so popular or so useful to society that his pardon may be demanded, or he may be so detested that society in the form of a mob may take him out of the hands of the prosecutor and the law, and lynch him. In early times the prosecutor demanded both reparation and revenge, or was allowed his

[1] *Cf.* von Ihering, *Geist des r. R.* iii. p. 339 (Meulenære, iv. 328), where the order of ideas given is utility, good, value, enjoyment, interest; von Wieser, *Natural Value*; Smart's *Theory of Value*; Böhm-Bawerk, *Capital*.

choice. But as the State grew stronger it took revenge into its own hands, and when the prosecutor established his case inflicted punishment in its own way, and for public purposes only. In actions of damages revenge is latent, but exemplary damages against a co-respondent in a divorce case partake of this nature. The State regards the criminal and the civil law as two different machines for the regulation of human relations. Many persons may escape from the meshes of the criminal code, and yet be undesirable members of society. For the actual criminals the State sets up artificial persons with rights of prosecution and punishment, and creates artificial obligations of penalty. The remote end is the protection of person and property, and incidentally the reformation of the culprits. For the classes of society higher on the scale the law courts are open, which will award damages, heavy or light, according to the character of the act complained of. It may border on crime, or it may be all but innocent—almost an accident. The civil courts in many cases arbitrate on true disputes of right. It is desirable to remove these, for if unsettled they might lead to breaches of the peace.

In dealing with these higher classes, it is possible for the individual to protect himself by refusing to deal with or have intercourse with the objectionable person. This is a powerful sanction, and is made operative indirectly through the criminal or civil remedies.

To determine what classes of acts require punishment, and the kind of punishment to be inflicted, belongs to practical politics and ethics. It depends on the spirit of the people to be called criminals, and on the state of public opinion. To put some acts among crimes might raise them for the moment to the rank of virtues. Perhaps the criminal machine is too coarse and rough in operation, when mere ridicule might suffice to put down the conduct complained of. Where the line is to be drawn between crimes and other acts is therefore a question of practical experience and

mature judgment as to the effect of laying down a rigid rule. Why the line is drawn at a particular point is ultimately a question of expediency, and perhaps of metaphysics, as when we discuss the distinction of *malum in se* and *malum prohibitum*.

"Force is no remedy." When you have to appeal to a person's reason with shells at a range of five miles, there is something seriously wrong with it. Law appears afterwards, when the parties have come to see the futility of mere force, and set themselves to find a more rational way of reconciling their differences. They translate the result into an intellectual form, as when the man to whom life is all-in-all accepts slavery rather than death.

The subject of sanctions has already been dealt with, because it has been maintained that a sanction is an essential element of law, but it must be borne in mind that it really belongs to politics and not to jurisprudence proper; it determines the mode by which people shall be driven into the courts to have their disputes decided.

Much popular misapprehension as to the nature of law is due to the fact that a crime and a criminal trial are regarded as types. A criminal trial is more interesting and more easily followed than the ordinary legal dispute. The State has taken over the matter so completely that the ordinary citizen stays away or looks on to sympathise with the poor prisoner against the tyrannical police! On the other hand, one of the most striking phenomena of law is that most cases of dispute are decided extrajudicially or apart from the Legislature. This is by no means a modern phenomenon, The laws of Moses take outside customs for granted, as do the laws of Manu and the Qu'rân. In the family group rights are decided as to inheritance without going to the courts; contracts and bargains are fulfilled every day. In modern systems we have the *Conseil de Famille* of the French law (*Code Civ.* art. 407), which has important administrative or semi-judicial functions, and the *Familienrat* of the

German code (§ 1858) which has important duties of guardianship. In England we have the extensive application of arbitration, private trust-deeds in bankruptcy, and in general the universal freedom of contract. It is thought by English critics that in Scotland the extrajudicial administration of testamentary and family trusts is carried too far. And even when parties reach the courts the natural tendency encouraged by the judges is to compromise. In short, if at every turn we had to go to the courts to settle disputes, commerce, even ordinary social life as now understood, would be impossible. And so far is it from being true that what the law deals with is crimes and criminals, the very opposite is the fact. Criminals are an insignificant minority of the population, either survivals of an earlier civilisation, or the waste products of modern society. And so far from the criminal law being a type of all law, it rather appears that the only statement with regard thereto which we can make with confidence is that our system of punishment is a failure. —(13 *Jur. Rev.* 133; Sir R. Anderson in *The Nineteenth Century*, Oct. 1902, p. 562.)

SECT. XXII.—PUBLIC AND CONSTITUTIONAL LAW.

In public and constitutional law we see law and right coincide in the ideas of sovereignty and jurisdiction. We see also an extension of the working of sanctions. The ruler and the judge are individuals vested with official rights, assumed or granted. These rights come into conflict with the rights and liberties of their subjects, and the collision is resolved by custom, compromise, or contract as in ordinary rights. The contract often takes the shape of legislation.

A good example of the difficulty of differentiating public and private deeds, rights, and laws, is the Great Charter of King John. It was in form a grant of liberties—a donation to be held by the donees and their heirs of the king and his heirs, for ever, and yet it was in substance a code of laws, a

concession of rights, the undertaking of obligations by the king.[1] In form it may be said to be a treaty between the king and the nobles, as representing his subjects, the nation. It is suggested that there is no sanction to enforce such laws. If it is a material physical embodiment of force which is demanded, we have something actually amounting to this in the Pope, and his spiritual-physical sanctions of excommunication, dispensation, and such jurisdiction generally. If an external force is wanted it may be found in the ultimate right of rebellion of the subjects (pp. 131, 200, *supra*). It is however in reality the spirit of law which animates the British constitution. As Sir John Seeley remarks, "We have reduced revolution to a system and given it legal forms. We have always a revolution, and therefore, in a certain sense, we never have a revolution."—(*Political Science*, p. 195.)

But in the case of the Crown or a ruler sanctions may be dispensed with even theoretically. *Noblesse oblige.* As we suggested before that with the sovereign claim and right were identical, so now it appears that duty and fulfilment coincide. An appeal to the honour of the sovereign is more powerful than the pillory to a churl. The king's conscience may be a powerful sanction. Even the unjust judge satisfied the importunate widow to get rid of her. Fasting was enjoined by the Irish laws on chieftains and persons of distinction (p. 58). But in all these cases the interest of the ruler or judge is to grant the prayer of the petition.

In early English practice the appeal to the king for justice in his own court would cause no difficulty, for similar appeals were made to lords of manors and inferior judicatories. These had adverse personal interests to serve, and hence we see appeals from them and procedure directed to the correction of abuses. The king reformed these, and protected his subjects against the nobles. It required a civil war and a revolution to do the same for the king himself.

[1] Pollock and Maitland, i. 507. Many similar examples are given by Prof. Sigel in *Slavonic Law.*

In modern practice provision has been made for suing the servants of the Crown and public departments as if they were private individuals, and costs may be awarded to or against the Crown.—(20 and 21 Vict., cap. 44; Clode, *Petition of Right.*) Parliament is now sovereign, and by these enactments it has in effect declared that wherever the judges in the ordinary law courts consider the Government to be bound as a private citizen would be bound, it will acknowledge and fulfil its obligations.

In the end of 1896 a lawsuit was brought against the Egyptian Government in the Egyptian law courts in order to prevent the appropriation of money from the general reserve fund to the expenses of the then recent Dongola expedition. The judgment of the courts was shown to be wrong by the legal adviser of the Egyptian Government. It had no foundation in law, and less in equity, and yet Great Britain set the example to the world of acquiescing in and enforcing an unjust and illegal decree, in order to show respect to law. The example was an object lesson in constitutional law (State Papers, Egypt, No. 1, 1897).

If any one suggests that such transactions do not fall within law properly so called, he merely proves that his definition of law requires revision. This is an unfortunate legacy which jurisprudence owes to philosophy that history and patent facts are twisted to suit *a priori* theories, instead of, as in every other science, the theory being altered as knowledge of facts and experience grow.[1]

But the coincidence of law, right, and duty may be seen in the case of inferior judges. The Judicial Factors (Scotland) Act, 1880, sect. 4 (7) provides:—

"It shall be the *duty* of the Accountant [of the Court of Session], when it appears to him that there is a diversity of judgment or practice in proceedings in judicial factories in the sheriff courts which it would be important to put an end to, to report the same to the First Division of the Court of Session, specifying the proceedings in which such

[1] Even geography was once treated as a science not of what *is* but of what *ought to be* (Arnold's *Thucydides*, vol. iii. p. 2; pp. 2-3, *supra*).

diversity appeared, and asking for a rule to be laid down to secure uniformity of judgment or practice in such proceedings, and the Court shall consider such report, and if they shall see fit, shall lay down such a rule accordingly, which rule the several sheriffs and their substitutes shall be *bound* to observe."

The Court here is to legislate in a judicial fashion by laying down *a rule*. How is the duty of the Accountant to be enforced? How the obligation or duty of the sheriffs and their substitutes? This is a law for the benefit of the lieges, but it is enacted as a piece of machinery dealing with the duties (obligations) of officials, and rights or jurisdiction of the judges. These are proximate ends, the more remote ends are the rights of the lieges. The power of enforcement is only indirect, for the law relies in practice on the rectitude of the officials.

So in B.C. 67 a *Lex Cornelia* made it illegal for a prætor to act contrary to his edict.—(Smith, *Dict. Antiq. s.v.* "Edictum.") And in the Canon law we find rules laid down for judges, with the sanction of removal, or some other penalty.[1] The same device occurs more recently in British Taxing Acts, *e.g.*, Taxes Management Act, 1880, sect. 121, &c. The appointment of the judge or of the tax collector is the setting up of the legal machine. He may be regarded as a sanction to the rights of the Crown or of subjects and the corresponding obligations. But he has official rights and official duties, both to the Crown and to the subjects with whom he comes in contact. These are sanctioned expressly in the laws quoted.

But as the extrajudicial application of law far exceeds in amount the judicial; and as even among private individuals the spirit of law, the voluntary obedience to law, prevails, so the higher we rise in the social scale, we ought to find less appearance of constraint and force in the submission to law.

[1] Examples will be found in the titles, *De Treuga et Pace* (Decretal. Gregorii IX. i. 34, 1; Extravag. Commun. i. 9); *De Hæreticis* (Decretal. Gregorii IX. v. 7, 9). *Cf.* Code of Khammurabi, sect. 5; Johns, *op. cit.* p. 2.

In practice this is encouraged by removing possibly conflicting interests. The liberal salaries paid to judges and other officials save the pockets of the public in the end. But if the habit of extortion and of taking bribes has once been established, the mere payment of adequate salaries will be insufficient to eradicate it.

The obedience to a tyrant or a corrupt tribunal is an apparent obedience to law. The relation is a parody or a caricature of a legal relation. The legal machine is perverted to another end than that for which it was invented.

SECT. XXIII.—*UBI SOCIETAS, IBI JUS.*

We have spoken of society, the state, and the world. But there are many societies, many states, many worlds. Each of these gives rise to different claims, different feelings, and different sympathies, and hence different laws. The differences may be local, as in laws of different countries or in local customs; or they may belong to different professions or associations for different purposes, as in ecclesiastical laws, military laws, maritime laws, commercial laws, political laws, family and domestic laws, municipal and police laws, laws of clubs, laws of games. In each of these cases we have claims of members and corresponding duties on others, general or particular (*i.e.*, *in rem* or *in personam*), and we have the recognition and enforcement of these claims and duties, and if necessary the enactment of general rules by the society itself, even though the society consist of only two members. It may be unwritten and traditional, as when a group of school-boys superintend a fight to see "fair play."

Such law is sometimes recognised by the State courts, as when it was suggested that the Kennel Club should legislate as to the practice of weighting with lead lozenges the ears of collie dogs so as to make them droop.—(*Gordon* v. *Watson and Montgomery*, 10th Jan. 1899, 6 S.L.T. 274.) The Free Church

of Scotland affords an example of a society which made laws for itself by forms of legislation. The Barrier Act and Declaratory and other Acts were recognised by the Court in the litigation between the United Free Church and the dissenting minority.—(1902, 4 Fraser, 1083; Innes on *Creeds*, 2nd ed. Appendix.) In a slander case you might have to prove the laws of whist, as in another case you would prove the customs of a trade, or the laws of France, or the rules of an Indian caste.

Even the chance group of individuals who come first into a railway carriage associate themselves instinctively into a community to keep out new-comers. The case of *Thorogood* v. *Bryan*, in which it was decided that when two coaches race, and a passenger in one is injured, he has no action against the driver of the other coach or his employer, has been commented on in subsequent cases.[1] But the old decision becomes more intelligible if we imagine each man of a group of passengers in fact identifying himself with his coach, cheering on his own driver, and betting on the result. Each passenger feels that the defeat of "his" coach is the defeat of himself. This is probably one of the simplest and most instructive cases in which a person identifies his rights with those of a group.

Gambling and duelling are spoken of as vices; and they are so from certain standpoints, but duelling may be compulsory—a duty—as it is in certain armies. If we regard these institutions as permitted, we have a new region of law[2] and morals. There are laws of games and of the duel. There may be unfair players and duellists. A gambler may be an honest gentleman, play fair, and pay his debts; a duellist may violate the laws of honour, and seriously wrong his adversary. This may be seen from M. Croabbon's book, *La Science du Point d'Honneur*, Paris, 1894, where the laws of duelling in various countries, the relations of these laws to the municipal laws, civil and criminal, are seriously and

[1] Smith, L.C., 10th ed. i. 277. [2] Pothier, *Contrat du Jeu*.

learnedly discussed. We have "society" represented there by witnesses and seconds, who come into conflict with the wider society represented by the police and the law courts.

This explains the Irish Home Rule movement in some of its aspects. We have a body of men who have no sympathy with the colonial and mercantile enterprise of Great Britain; who wish merely comfortable idleness and to follow small agricultural pursuits. The two worlds come into collision. Both sides use force to compel individuals to associate themselves with the wider or the narrower sphere. If an act granting political independence were passed, it would merely crystallise the social into a political state. The energetic mercantile portion of the population of Ireland would either emigrate to make their fortunes in the neighbouring mercantile states, or through commerce make themselves an organic part of the mercantile world-state. The agriculturist would continue to live in his agricultural world, and to him it may be thought a question of expediency which government is best, and whether it would not be wiser to take peaceful advantage of the large market afforded by the commercial population. For a small retrograde agricultural community to take a place among the nations of the world is a contradiction in terms. The government that keeps best order with the least cost is probably what he prefers. His crops may be destroyed by storms, or insects, or armies, or hostile tariffs. He meets these enemies in different ways; but a large and well-organised state may assist to meet the first as well as the last.

This fact that each world has a moral and legal atmosphere of its own may help us to understand one of the difficulties of dealing with the criminal population. The thief caught, one of a gang who suffers imprisonment for the whole, is a hero and a martyr. The applause from his own circle—his own world—outweighs the opprobrium of the society represented by the judge and his court. If his friends in the gallery applaud and sympathise, he in his heart laughs at the

court and its sentence. There is a conflict of laws, or of law and morality, or of moralities, but the State laws and the State morality are far from being always victorious.

The Mafia in Sicily illustrates this on a gigantic scale. Here we have a government set up in opposition to and defying the legal and ostensible Italian government. Its sanctions are real—murder and terror. The regular government has only recently put forward its power. If it cannot crush such a conspiracy, there is no reason for its existence.[1]

SECT. XXIV.—INTERNATIONAL LAW.

We have seen how international rights and international duties come into existence. International law emerges as soon as such rights and such duties find expression and embodiment in State persons, acts, and things—kings, ambassadors, war, armies, and navies. It is a device to enable States and their subjects so to adjust their intercourse as to prevent friction; and where there is collision in trade or war the governments adopt rules to lessen the force of the impact. These are enforced, sanctioned, and obeyed in exactly the same way as the municipal law, because the rules are ultimately enforced by individuals against individuals. They are the same invention applied to a different purpose, just as a steam engine will propel a merchant ship as well as a cruiser, and gunpowder will blast coal as well as project shells. The immediate purpose may be different, but even the remoter one may be identical—promotion of trade and making of money, the keeping of order, the promotion of science and art, philanthropic intervention for the suppression of slavery and cruelty, or for the spread of civilisation and religion. The King's peace is represented by the peace of God or of the Church. And the supreme embodiment of law is found

[1] Crawford, *Rulers of the South; The Times*, 22nd December 1899 and 18th October 1901. (Palmer's *Index*.) Another interesting and instructive example will be found in an article by Mr. Ambrose Pratt on "Push," Larrikinism in Australia, in *Blackwood's Magazine* (vol. 170, p. 27).

in the Emperor, the Pope, or congresses of statesmen, and ultimately in the armies and navies really at their disposal —real because the spirit of the age, public opinion, is behind all.

In international affairs we sometimes find the feeling of right unduly and excessively developed. This tends to make the claimant of certain objects aggressive and forgetful of the interests of others. Again, we find the feeling of duty exaggerated. With some people their own State is always in the wrong. They are friends of every country but their own. Lastly, the idea of law may be caricatured by those who think that they can write in a book the limits of national collision and aggression, that human judges can settle these and armies and navies enforce them.

These ideas work satisfactorily so long as the men composing the worlds are not very different. Europe and America are homogeneous, and therefore international law is possible. Turkey and the East are different and hostile, and the law is of a different class, on a lower platform. China is a new world by itself, large and self-contained, and all but able to keep the Western world out. Their civilisations are so different that intercourse becomes merely mutual toleration, and law is reduced to exhibitions of force sufficient to extort such toleration. The law depends on physical characteristics which men cannot alter and to which they must adapt legislation.

SECT. XXV.—CONFLICTS OF LAWS.

We have already met with collisions of rights (p. 123), and collisions of duties or obligations (p. 174), and collisions of systems which assume the form of law (pp. 274 and foll.). Many of these collisions are solved by force—by denying to rivals the name of law.[1] If, however, we have true and valid laws, *i.e.*, recognised not only by particular societies

[1] See Dicey, *Law of Constitution*, p. 442, on the meaning of the word "unconstitutional."

but by a wider circle such as the family of nations, these laws may appear to conflict. Public international law deals with some such cases as by laying down a rule of non-interference with the internal affairs of foreign states. That is to say each state regards the jurisdiction of its neighbours as exclusive and final.—(*Cf.* p. 361, *infra.*) Then within the state general laws may conflict with particular laws, posterior may contradict prior laws. There the general will prevail over the particular, or *vice versa*, according to the view adopted by the state itself. Posterior abrogate prior laws as a general rule, saving vested interests (rights).—(Guthrie, *Savigny*, pp. 66, 334, &c.) But the phrase "conflict of laws" is applied specially to a common case of the collision of rights, where a right in one person which has associations derived from a particular system of local law is met by a right in another person, the interpretation of which and the associations of which, being derived from a different system of local law, are different.

This in earlier law was a *casus improvisus.* The rules framed by courts and legislators for the purpose of settling or preventing disputes did not justly and properly apply, and so gave rise to a new dispute. One plan was to fall back on general equity, or the law of nature. This was unjust, for it generally would result in every judge treating his own law as equity, justice, and the embodiment of common sense. But we have now a developed system of doctrines which determine which law is to be applied. This is a logical system as well as political and ethical, but, like procedure and evidence, it affects rights indirectly. It is, so to speak, one degree removed from substantive positive law. When once a decision has been given it not only makes law in the particular case, but, especially in British courts, creates a precedent. It is then true law, for parties will contract and enter into legal transactions in reliance on the same decision being given again. A German will feel wronged if he does not receive the same treatment as a Frenchman. The subject

is therefore true law, and as such is dealt with by the legislatures as in the Bills of Exchange Acts, British, Indian, and Colonial, and by the German, Japanese, and other codes. The law is international, (1) because an ideal system would be identical in all civilised States—a true *jus gentium*; and (2) because it is one of the most important parts of the legal machinery to prevent friction between the members of independent States. If it were abolished commerce would disappear and pre-historic barter would take its place. Even if the refusal to do justice to foreigners were not a *casus belli*, it would provoke universal reprisals. The recent treaties of the Hague on procedure, bankruptcy, marriage, &c. show that the subject is truly international. These treaties approach nearly to simultaneous legislation.[1]

SECT. XXVI.—THE PROFESSIONAL BIAS.

The worlds to which we have referred are those of ordinary men, but the lawyer lives in a world of ideas and abstractions peculiar to himself, in which he looks for symmetry and arrangement—logical coherency. If he misses this it gives him pain. A decision may be law but it is bad law. It may have legal attributes but be wanting in *elegantia*. The common man looks for a more immediate harmony of his feelings of justice in actual things —justice in a narrower world of his own present surroundings, with less reference either to the past or the future—more abstract than the lawyer's world or more concrete.

Even the lawyer may show in his own conduct the different worlds to which he belongs. Thus Browning describes Dominus Hyacinthus de Archangelis. This old pedant does not live in the world of the accused and his friends, nor properly in the ideal world of the law. These to him are accidents. The world he knows is the narrow one of professional emulation—the Court and Dr. Juris Bottini and

[1] Miller, *Law of Nature, &c.*, p. 68.

a few spectators, a literary world which admires Horace, Vergil, and elegant Latin; and finally and really the world of his family circle, his wife and son, or perhaps more truly his own selfish person.

The professional bias has an important effect on the modern law, as was exemplified in the strenuous professional opposition to the reform of the land laws in South Australia by the Torrens Act (p. 451, *infra*).

SECT. XXVII.—*ELEGANTIA.*

When an art has progressed to a certain stage, it tends to assume ornament. Tools, weapons, garments, houses, temples, everything made by man, besides subserving practical ends, tend to gratify a taste for ornament. The military art has an ornamental side in uniforms and evolutions—both utilitarian in their conception but dangerous when they defeat the primary end, as when uniforms attract the enemy's fire, or bookish evolutions expose men to unnecessary danger. Religious worship has given birth to all the fine arts—the drama, architecture, sculpture, painting, and music, oratory, philosophy, and science. So with law, royal magnificence is designed to strike awe into the beholder. The scarlet robes of the Doctor of Laws—now borrowed by the other Faculties of the Universities—are derived from the Imperial purple. The justiciary robes worn in Scotland were enacted by statute (1672, c. 16) for the purpose of impressing the spectators. The dress and ceremony of courts have the same result, and a witness has been known to confess to perjury because a case was tried without ceremonial. The eloquence of the bar and the elegance of delivered judgments are still further examples of the same tendency. The care lavished on the beautifying of charters, and the careful writing of law deeds, which removes one cause of difficulty of interpretation, are due to the same cause. And so, finally, are the attempts to make law symmetrical and logical. Neat epi-

grammatic maxims and even long wordy deeds, which do not allow the slightest mesh of the legal net to be broken, may appear as examples of *elegantia*. It has produced logical arrangements, and at intervals codification—not merely lists of rules, but rules arranged on a logical basis. Law reports which give every word uttered by the bench are clumsy; head notes repeating the facts given in the report are condemned; what we now aim at is neatness and simplicity. Our Digests must be scientific, though we may sneer at jurisprudence and philosophy; mere dictionaries in alphabetical order are insufficient. Under each word we attempt an organic and reasoned arrangement. And in our pleading we repress irrelevancy. The Scottish Procedure Acts enjoin pleaders to make their written statements short and avoid unnecessary quotation.[1] Military and Indian indictments are made brief, clear, and intelligible, but some complain that Scottish indictments are now so short that they are hardly fair to the accused. Deeds of conveyance have been so shortened that the old-fashioned art of the conveyancer has practically disappeared. But there is still much room for improvement in the *elegantia* of Acts of Parliament as well as of private deeds.[2] And lastly, we admire the *elegantia* of the skilful practitioner, who has neat and ready remedies for wrongs or neat replies to unjust demands. We cannot help admiring clever dodges, even when they evade the law, in terms of the game.

In the Roman law *elegantia* did not refer to mere forms, but was applied to internal coherence and symmetry in the substance of the law (Bryce, *Studies*, ii. 198).

SECT. XXVIII.—THE SPIRIT OF LAW.

We have spoken of law sometimes as an art, and sometimes as a contrivance—a machine. This is not inconsistent,

[1] 39 and 40 Vict. c. 70, sect. 6. The Act of 1672 restricted the eloquence of Scottish counsel to half an hour.

[2] Sir C. Ilbert, *Legislative Methods and Forms*.

for the human body is a machine, and the whole of life is an art. Walking, speaking, manner of eating, are all learned in childhood; and if we try a new mode of progression, skating, cycling, or dancing, we go through the same process from conscious adjustments to subconscious habits. Morality is an art, and it is only in very recent speculation that ethics has been regarded as a science. The body may be described as the instrument of the soul; but we know nothing of souls except through bodies.

In like manner law is a process of adjustment. Rights and duties would probably adjust themselves somehow; but what is specially law is the element of force in the wide sense already explained, *plus* advice contributed by society. In childhood and youth education helps to smooth over collisions; the energy and vigour of youth make men self-assertive and selfish; the person is taught to adjust and reconcile himself to his environment of men like himself. In later life law does this by giving him rules and hints how he may do it for himself, threatening and expostulating if he fail so to do; and increasing the pressure of force till in despair it gives up the problem by locking the individual up, banishing him, or hanging him. Many good and innocent people have been hanged, beheaded, or burned simply because a rude society could not assimilate them to itself, or they could not adjust themselves to their environment. A sea rover who in one age would found a noble family might in another be hanged as a pirate.

In another view law is a plan or scheme of life to which individuals are required and expected by their neighbours to conform. Like the published order of a procession, it may settle disputes in advance. If a dispute does arise, it enables the master of ceremonies (the judge) to settle it. If a whole society sets itself to defy a rule enacted by a political superior the rule will necessarily be abortive. The Austinian theory of commands and sanctions appears plausible, because the society *de facto* obeys and the law has to deal with an insig-

nificant fractional percentage of a minority. It may be said that the law has coerced a few and frightened the majority. Such a statement cannot be supported historically. It might as well be argued that the figurehead draws the ship because it goes first. We no longer regard this as the presiding genius that guides the ship. The Austinian theory hardly explains a conquest of slaves; and it certainly does not explain the rise of law in a society of freemen, for it ignores the fact that even the slave is a rational human being, and even in surrendering and obeying, in order to save his life, is legislating in a sense for himself and his own interests. A society of men is not like a troupe of performing dogs. If the master of the dogs leaves them, they die or revert to a state of nature. Whoever heard of dogs deposing their trainer and continuing to perform on their own account, as did the founders of the Roman, the American, and the French Republics, and the Spanish armies in the Netherlands? Not only do rulers take advantage of the spirit of law, but, as we have already observed, the common man who calls his claims rights does so in an unconscious attempt to justify them.

"Validity" originally means physical force; but in modern society it refers to the subconscious spirit of the age Even to the most primitive savage this spirit is subconscious. Law thus appears first in the physical form of judges, gallows-trees, and execution stakes, but later it means the spirit which dominates all human society. And, in a second physical form, it is applied to the decrees and statutes, and the various concrete forms which are adopted by the State for the definition of rights and obligations.

SECT. XXIX.—ANALYSIS AND CLASSIFICATION OF LAWS.

In our examination of right we saw the idea pushed back from action to title — dominion, possession, &c. — and interest—material, sentimental, public, &c. So also the idea

of obligation was pushed back from the actual binding of the slave or debtor to the ideal binding of a legal tie—contract, &c.—or to the spiritual bond of duty. We now see a parallel development of law.

Here, too, we begin with rude execution—action. Law regulates this if only to see that the creditor takes only his pound of flesh and no more. We still in modern times have the law of execution and diligence; but it is a mere appendage, no longer the whole law.

But mistakes may be made, and inquiry preliminary to execution is generally expedient. Here we have evolved a law of procedure. It may be by putting the accused to torture. If he confesses it is his own fault; but we have at least some evidence to go on (p. 216, *supra*).[1]

The third stage gives us the law of evidence. It may be said that in many aspects this is quite modern—later than Bentham. The oath was an early attempt to get over injustice on the part of the witnesses.[2]

A fourth stage is that of codes and statute law, to protect litigants against judges. Codes and statutes are—(1) declaratory; (2) amending; and (3) prophylactic (anticipatory—preventive). As to misconduct of judges, Parliament and the Crown can protect individuals to a certain extent.

But who is to judge statutes? The American Constitution goes further and lays down certain fundamental laws, which the Courts must observe.[3] The sovereign people are final in matters of legislation between classes; but they are open to all the influences of the pulpit, the press, and public opinion generally.

The classification of laws as public and private, civil and criminal, ecclesiastical, military, commercial, land, &c., depends on interests.

As we have contingent and conditional rights, and contingent and conditional obligations, so we may regard statutes,

[1] Stephen, *Hist.* i. 298.
[2] *Ibid.* i. 350, 358.
[3] Bryce, *American Commonwealth*, chap. xxiii.

and in their secondary use leading decisions and preeedents, as contingent and conditional laws, depending on the existence or non-existence of a person claiming the right and a person against whom the duty may be enforced, and on other external facts and circumstances, including material objects, giving rise to the rights.

If we examine the various words which have been used for law from time to time, we shall find ample historical confirmation of the views which have been advanced in the foregoing sections, and a brief examination of some of these words will profitably complete this chapter.

SECT. XXX.—THEMIS—Θεσμός.

We may take the word *θέμις* as a type of the earliest law. It is commonly derived from the root of *τίθημι* (I place), and may be connected with the orderly placing to which reference has been made (p. 206, *supra*). Θέμις is the Homeric official who calls meetings of the gods and keeps order at their banquets. This idea is physical.

The following order of association may be suggested among the various meanings in which the word is used. Examples will be found in Liddell and Scott's *Lexicon* (8th ed.) and Clark's *Jurisprudence*, p. 42 :—(1.) The meaning of a decision, a sentence, a doom occurs in Homer, the word being used in the plural for the general sense; (2) it also means "claims"—to be judged by kings and judges; (3) then it means the rights or prerogative of the judges; and hence (4) the *dues* of the king or lord. Parallel with these usages there is a supernatural application in (5) the decrees of the gods—oracles —and this takes a general form in (6) old sacred law, the basis of *θέμιστες*. Taking the contrary view, it is applied to (7) mere custom, or to (8) ordinary law. It is materialised in the object of some laws—(9) punishment, and is personified in (10) the goddess of Justice. The order of meanings here given differs from that given by Liddell and

Scott. The order given by Professor Clark (*op. cit.*) is open to criticism, because the meaning he puts first is too abstract. If *θέμις* comes from the root ΘE, *to set* or *appoint*, it must have been some thing or person that was set or appointed—the boundary stone, the pillar with the law thereon, or the judge himself. If the word *θεός*, as the professor suggests, is referable to the same root, God is the appointer and the setter of all things, like *μοῖρα*—the providence that keeps all things in their place in order, the seas and rivers within their bounds. Nor does the learned professor give sufficient weight to the fact that the Homeric Greeks did not draw a sharp line between politics and law. One person ruled and decided cases, and the word *θεμιστεύειν*, as he shows, applied to both.

The transition to the divine was easy, for with early peoples a little intellectual skill counts for much. The Hebrews came to Moses "to inquire of God"; the Shades came to Minos, though what they had to quarrel about it is hard to suggest—

οἱ δέ μιν ἀμφὶ δίκας εἵροντο Φάνακτα.

(*Odyssey*, xi. 570.)

It helped royal and judicial authority to pretend inspiration. Perhaps, like witches in modern times, the judges deceived themselves as to their divine right and powers. The natural and the supernatural develop simultaneously, and the word *θέμις*, however we arrange the meanings in order, gives us an example of the process of unconscious analysis already pointed out. The name is applied to each new element which is noticed. Its novelty makes the new element appear as if it were the essence of the relation.

The use of *θέμις* as custom and beyond strictly legal applications, is similar to the use of *δίκη*, to be hereafter noticed (p. 368, *infra*).

Θεσμός from the same root may mean a statute—something set up,—and hence an ordinance or law. This was applied particularly to the laws of Draco, as opposed to

Solon's laws which were *νόμοι* (Liddell and Scott, *s.v.*; Clark, p. 48). But in the fifth century B.C. the word *νόμος* was applied to the law of Draco on murder, then freshly copied and set up in Athens on a marble tablet.[1]

SECT. XXXI.—Νόμος—Nομός.

The derivation of the Greek *νομος* in the double sense of law and allotment of land illustrates the early idea of law as a means of keeping order. If geometry, as we have seen, took its rise from the practical art of measuring out fields in Babylonia and Egypt after boundaries had been obliterated by the rise of the great rivers, so we may imagine that private law took its rise in a similar way.[2] The mode of settling disputes and fixing boundaries between claimants and the allotment itself might well receive the same name.—(P. 38, *supra*).

SECT. XXXII.—*JUS—DROIT—RECHT*—RIGHT.

Reference may be made to our previous examination of these terms (pp. 33-50).

Jus starts with the rude procedure of an action at law, and ultimately becomes the most general word in the legal vocabulary.

Droit in French, and still more *Recht* in German, suggest moral uprightness and perfection, and in addition they now translate the Latin word and mean all law. But they are sometimes applied to particular laws, or to laws of particular subjects—*Seerecht* (droit maritime), *Kirchenrecht* (droit canonique), &c.; or to legal philosophy in *Naturrecht* (droit naturel). (*Cf.* p. 129.)

Jus is derived from formal right; the other words from substantive right.[3]

[1] *Cf.* Clark, p. 55, with Dareste, &c., *Recueil des inscriptions juridiques grecques* (2nd ser.), p. 2; Aristotle, *Const. of Athens*, 7, 53, 55.

[2] See Haxthausen's *Russian Empire*, i. 119, as to division of land in the Russian village communes. There were similar problems in our own island: Seebohm, *The English Village Community*.

[3] A similar parallel may be noted in other cases; *cf.* p. 74, *supra*; Yzquierdo *v.* Clydebank Engineering Co., 1902, A.C. 524.

SECT. XXXIII.—*LEX.*

The Latin *lex* has originally a physical reference. If it comes from *legere* (to read), it points to definition by writing and publication,—in fact, legislation. The Twelve Tables were cut on tablets of bronze; other laws were cut on tablets of oak, and set up publicly.[1] The laws of Gortyn were carved on the walls of the court-room or forum (*Law Quarterly Review*, ii. 135).

If *lex* is connected with *ligo* (I bind), it may be suggested that the binding effect of law on the persons to whom it is addressed, or those whom it affects indirectly, is meant (p. 203, *supra*). But it may well be connected with *lego* (I collect, I gather), the same word which was applied by the Greeks to articulate speech, and by the Romans to the art of grouping written letters into words —the art of reading. It may have referred to the collection of the people in the legislative assembly which voted the law, or the collection of the votes by pebbles or marking-points on tablets and reading and counting them after. *Lex* might thus mean the vote and then what was voted.[2]

In support of such an etymology, the early use of *lex* may be quoted. It is defined by Ateius Capito, who was, according to Aulus Gellius, highly skilled in law both public and private, as "Generale jussum populi aut plebis, rogante magistratu." And a plebiscitum, according to the same authority, was a "Lex, quam plebes non populus accipit."—(Huschke, *Jur. Antejust.* 5th ed. 121.) It is an enactment solemnly made in a certain form.

Then it is commonly applied to the Twelve Tables, which are spoken of as *leges*. It is questioned if the word "lex" is applied to single enactments, but this seems to occur in passages of Livy, Cicero, and Festus—*e.g.*, this last writer says, "In secunda tabula, secunda lege."—(Huschke, 121.)

[1] Clark, *Jur.* 31; Smith, *Dict. Antiq. s.v.* Lex.

[2] *Cf.* Convention, meaning an assembly of people or an agreement or treaty.

Livy says "in XII. Tabulis legem esse," &c.; and Cicero speaks of the original Ten Tables as containing *leges*, and denounces the last two as containing the "inhumanissima lex," forbidding marriages between patricians and plebeians.

Then *lex* is applied to private contracts by both Varro and Cicero.—(Lewis and Short, *s.v.*; Bruns, 388.) Examples both of this and the following usage will be found in the title of the Digest, *De Lege Commissoria* (18, 3). (Voet, *Comm.*, Berwick's Trans., p. 45.)

It is commonly applied by Gaius and Justinian to the conditions or terms of a contract.—*Lex venditionis*—*Lex conductionis* (Gaius, iii. 145, 146; *Inst.* iii. 24, 5).

The phrases *ex lege* and *ex legibus* suggest at least the possibility of the modern abstract use of law, as meaning the spirit—the idea, which is the foundation of all particular enactments. So also does the *Lex Dei*—the *Lex Divina*—of the *Collatio*.—(Huschke, 645.) Similar phrases of a still earlier date will be found in the Latin Vulgate.

It is unnecessary to refer to the metaphorical uses, which were already common in classical times.

Papinian has defined "lex" very widely in a text put at the head of the title D. *de Legibus*, &c. (1, 3): "Lex est commune præceptum, virorum prudentium consultum, delictorum quæ sponte vel ignorantia contrahuntur coercitio, communis rei publicæ sponsio." In his *Institutes* Gaius had said (i. 2) that the *jus civile* of the Romans consisted of *leges, plebiscita, senatusconsulta, constitutiones principum, edicta magistratuum, and responsa prudentium.* Tribonian in revising the *Institutes* fell back on the narrower technical definition of Capito quoted on the preceding page. Where Gaius said, "Lex est quod populus jubet atque constituit," he put (*Inst.* i. 2, 4) "Lex est quod populus Romanus, senatorio magistratu interrogante, veluti consule, constituebat." But this very section shows that plebiscites, senatusconsults, constitutions of the Emperors *had the force* of *leges*, and so it was a very short step to call them laws.—(*Cf.* Moyle, *Inst.*

104.) In the Latin version of the 131st Novel (Const. cxx.) Justinian says "præsentem proferimus legem." Every one of these enactments might furnish examples of this usage.

This imperial usage prepared the way for the definition of Isidore of Seville, the first clause of which is given in the *Decretum* of Gratian (i. 1, 3; Bruns, 407): "Lex est constitutio scripta; mos est vetustate probata consuetudo, sive lex non scripta." Julian (L. 32, § 1, D. *de Leg.* (1, 3)) had indeed said "inveterata consuetudo *pro* lege non immerito custoditur," and in the following text Ulpian had expressed himself to the same effect, but using both *jus* and *lex*. In the *Decretum* of Gratian the idea of law is extended to the Papal legislation—canons of Councils, decrees of the Popes, and writings of the Fathers.

The identification of *jus* and *lex*, which may be noticed in the Oxford Degree of D.C.L. instead of I.C.D. is mediæval. The step, however, was a small one when we read in Ulpian (L. 24 D. *de statu hominum* (1, 5)), "*Lex naturæ* hæc est ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi *lex specialis* aliud inducit." Cicero's treatise "De Legibus" might be referred to for many references to *lex*, as "summa ratio," and such-like. The change was immediately brought about by the fact that the *jus civile* of Rome was embodied in the *Corpus Juris*. This was a written code—a unity—treated as a single coherent enactment—assumed to be self-sufficient. It was truly a *lex—the Lex Romana*—like the Twelve Tables in a former age. In mediæval charters we find the phrase *lex Romana* frequently used for *jus civile*.[1]

The mediæval meanings of "lex" given by Ducange (*s.v.*) may be sufficiently illustrated from our ordinary English usages.

The French "loi" is still used in the sense of a statute, "droit" being the general word for law.

[1] Savigny, *Gesch. rom. Rechts.* i. 105, 111; *Decr. Gratian.* i. 10, 13. See the Charters of the Abbey of Cluny, *passim*.

SECT. XXXIV.—EARLY ENGLISH WORDS FOR LAW.

Professor Clark (*Jur.* 62) has discussed these words very fully, and we may refer to his pages, but we must notice "dom," from which we take "doom" in a particular sense. The "domas" referred to by him were no doubt concrete cases of what was regarded in the abstract as *riht*—justice. —(Thorpe, p. 1 and foll.) Professor Clark's conclusion is that *domas* "rightly understood come very near to *θέμιστες*." —(*Op. cit.* p. 66.) Chaucer thus describes the legal attainments of the Sergeant of the Lawe :—

> "No-wher so bisy a man as he ther nas,
> And yet he semed bisier than he was.
> In termes hadde he *caas* and *domes* alle,
> That from the tyme of king William were falle,
> . . . . . .
> And every statut coude he pleyn by rote."
> (*The Canterbury Tales: The Prologue*, 321-324, 327.)

And in *The Faerie Queene* we read :—

> "For Artegall in justice was upbrought,
> Even from the cradle of his infancie ;
> And all the depth of *rightfull doome* was taught,
> By faire Astræa," &c.— (Book v., Canto 1.)

The word "Doom" is still used in Scots legal procedure in the death sentence, "which is pronounced for doom."—(Macdonald, *Crim. Law*, 3rd ed. 513 ; Hume *On Crimes*, ii. 6, 527 ; Green's *Encycl.*, *s.v.*)

In the English Bible the word "judgments" is often used in a sense approaching "law."—(*Cf.* p. 399, *infra.*)

The English word "law" is immediately of Scandinavian origin—*lagu*,[1] *lage*, and in Icelandic *lög* in the plural. Professor Clark (*Op. cit.* 68) says "*lagu* is that which *lies* or *rests*, not that which has been *laid* or *set*." Might they not be the *march-stones* set up or laid down, and which have perhaps lain or rested for years between the lands of conterminous proprietors, and were so sacred that they could not be disturbed ?

[1] Pollock and Maitland, i. 60.

The lagu, like the *νόμος*, would be a title; even a plain stone would be significant. But later a mark of ownership, a mark by the judge, would make it a real *title*, and this would be definition—delineation of boundaries.

SECT. XXXV.—DECREE, EDICT, *ARRÊT.*

(1.) The word "decree" carries us back to definition of what is doubtful. *Cernere* and *decernere* suggest the seeing through a complicated case—separating it from the tangled mass, and so deciding it.

(2.) "Decretum was a decision given by the Emperor on a question brought before him judicially," and is law (Gaius, i. 5, note, Muirhead's edition). It was also a particular form of interdict (Gaius, iv. 140).

(3.) The *Decretum Gratiani* is the first part of the *Corpus Juris Canonici*—a body of law.

(4.) Modern usage applies "decree" to single legal decisions as well as to legislative enactments.[1] This word[2] is used in Scotland for the formal and final judgment in all civil courts. The Court of Session summons, as given in the schedule of the statute of 1850, bears that "the defender ought and should be *decerned* and ordained by decree, &c." to make payment, or produce an account, or otherwise, according to the remedy claimed by the pursuer. The Small Debt Act of 1837 gives a similar form, omitting the word "should." The Sheriff Court Act of 1853 gave the form—"The defender ought to be *decerned* to pay," and the Act of 1876 (schedule A) causes the pursuer to pray the Court "to grant *a decree* against the defender, ordaining him to pay to the pursuer the sum of ." It is the solemn word "decerns" which converts an interlocutor into an extractable or enforceable judgment or decree (Mackay, *Practice*, i. 597).

(5.) The extract decree is the written document setting forth the judgment of the Court, and on it execution proceeds

[1] See Merlin, *s.v.* Loi, § 1.

[2] The older form "decreet" occurs occasionally, *e.g.*, in the Judgments Extension Act, 1868.

(Personal Diligence Act, 1838; Act of Sederunt 8th Jan. 1881; 55 and 56 Vict., c. 17, which defines "decree" as including "any judgment, deliverance, interlocutor, act, order, finding, or authority which may be extracted"). Stair and Bankton use decree or decreet for what is now styled the extract (Mackay, *Practice*, i. 581). The Scots extract decree is equivalent to a certificate of judgment in the common law procedure in England (Judgments Extension Acts, 1868 and 1882). The decree or judgment is the unit of law (pp. 28, 158, *supra*). It is a right in a person, and is assignable (Digest of Scots Cases, 1885–1895, col. 290).

(6.) In England the word "decree" was used in equity procedure [1] down to the passing of the Judicature Acts; but it is now used principally in divorce procedure (Sweet, *Dict. s.v.*). "In the Court of Arches a suit is commenced by a process called a decree, which is the same thing as a citation."—(*Ib.*) All these usages, English as well as Scottish, may be traced to the Roman or the Canon Law.[2]

(7.) "Edict" has a similar history. It implies publication. It may apply to any public notice (Smith, *Dict. Antiq., s.v.*), but it is best known as applied to the bodies of law promulgated by the Roman magistrates, including the Emperors. —(Muirhead, *Gaius*, 3, Note.)

(8.) Edicts still survive in the procedure of the Church of Scotland in notices as to ordination, and nominally in the process of "edictal" citation of foreigners in Scotland.

(9.) The French "Arrêt" may be noticed here (Merlin, *Rép. de Jur.*, Littré, &c.) It is the word "arrest"—to stop, to seize —and has therefore originally a physical reference. It comes to mean a decree of a supreme court, against which there is no appeal. It may be so called because it is a legal warrant for seizing the person or goods. The Low Latin "arrestum" is the *manus injectio*, and "arretare" is explained by Ducange by "accusare," "statuere," and "definire." Certain legislative

[1] Seton's *Judgments and Orders*, 6th ed., i. 186, 482.

[2] The word "discretion" from the same root is associated with "judgment" (Sharp *v.* Wakefield, p. 251, *supra*); Coke, 2 Inst. 56.

regulations (like our Rules of Court) or general decisions have been called "arrêts."

SECT. XXXVI.—PLEA.

This word is a corruption of the Latin *placitum*, from *placere* (to please), and comes to us through the Norman-French, like *droit* from *directum*. We might have appropriately discussed its meaning along with "claim," "competency," &c. in the chapter dealing with Right, but the association with private right is later than that connecting it with law.

The classical Latin *placitum* signifies an opinion, and it is common to find such a phrase as *Trebatio placuit* (used by Gaius, L. 5, § 1 D. *de acq. rer. dom.* (41, 1)) in quoting the opinion of any jurist :—

> "Victrix causa deis placuit, sed victa Catoni."
> (Lucan, *Pharsalia*, i. 128.)

Placitum is also used for a private agreement. This is common, as when Ulpian defines *pactio* as *duorum pluriumve in idem placitum consensus* (L. 1, § 2 D. *de pactis* (2, 14)). Examples are given by Brissonius (*s.v.*).

In the *Institutes* of Justinian (i. 2, 3) the phrase *principum placita* is used for *constitutiones*—the word which occurs in the original text of Gaius. The word here means laws. It does not imply capricious pleasure, but the public, of course, receive imperial decisions with extreme deference, as Gaius relies on what "pleased" Trebatius.

The word is then applied to the mediæval conventions for administrative and judicial business—the germs of modern parliaments. It means a meeting, a court, a decision, or a case brought up for judgment.[1] The derivation of *plea* from *platea, platz, place*, because the Court met in an open space or the street, seems far fetched. This is given by

[1] Examples will be found in Brissonius, Calvinus, and Ducange, *s.v.*; see also Godefroy, *Dict. de l'ancienne française, s.v.* "Plait" and Larousse, *Dict. Universelle, s.v.* "Plaid," &c.

Tomlin and by Bouvier (*s.v.*), the latter of whom erroneously refers to Cowel. The derivation receives some support from Hotomann's Commentary, *De Verbis Feudalibus* (*s.v.*), printed at the end of Brissonius, *De Verborum Significatione* (p. 1133). If there is any connection between the words, which may well be doubted, it is more likely that the open space takes its name from the nature of the meeting therein, as "church," "university," and "college" are properly spiritual corporations, and popularly conglomerations of brick and mortar.

The phrase "metre en *plet* lo senyor de la nau"—to raise an action against the managing owner—occurs in *Les costumes de la mar*.—(Twiss, *Black Book of the Admiralty*, iii. 208.)

The word in the short form of "plaid" has disappeared from modern French.[1] It occurs in the popular forms *plaider*, *plaidoyer*, like the English *plead*, *&c.*

A plea is an action and is so used in the first chapter of Skene's *Regiam Majestatem*.[2] This is an ancient use in England. We still speak of "the pleas of the Crown." These are rights—*jura regia* (p. 118, *supra*). The Court of "Common Pleas" dealt with disputes between subject and subject.[3]

Placitum we have just seen means a right—at least in the pleas of the Crown, and in like manner it becomes an obligation—a penalty, a fine.—(Tomlin, *s.v.*) Then in the phrase *placitum spatæ*—the power of the sword—we have the general meaning of "law." Ducange explains it by "merum imperium, justitia major, *Haute justice*, quæ jus gladii habet."[4]

In English and American law a plea is "the defendant's answer by matter of fact to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of law."[5] It was this answer which brought the question in

[1] Littré, *s.v.* Plaid; *cf. Placites de Normandie*; Merlin, *Rép. de Jur. s.v.*

[2] See Skene, *De V. S.*

[3] Examples of the word in various senses will be found in the laws of Edward the Confessor and Henry I. Thorpe, pp. 191, 222, &c.), and in Britton, *passim*; Dr. Cowel's *Law Dict. s.v.*; Black. *Comm.* iii. 40.

[4] *Cf.* Cowel, *s.v.* Pleas of the Sword.

[5] Bouvier, *Dict. s.v.* Plea; Stephen, *Comm.* iii. 546.

a legal form before the Court and made it a plea in the older sense. It was the essential part of a plea. In civil procedure in Scotland the analysis is carried further. A plea is a legal proposition put forward by any party to a cause and deduced from the facts which he avers.[1] It is not a general legal statement, but a distinct proposition purporting to dispose of the specific matter in dispute in whole or in part. If the Court sustain the plea it becomes law—a decree—in the senses already explained. The Scots plea in law is therefore a legal unit laid before the Court for adoption (*cf.* p. 294). It is the proposed foundation of a decree, as an interlocutor is originally an interim order, and then a proposed judgment, but is now applied to all judgments, including final ones.

In Scots criminal procedure the correct usage is similar to the English, but the word is loosely applied to preliminary pleas, "that the panel (accused) cannot be called on to plead." —(Alison, ii. 358; Hume, ii. 278.)

SECT. XXXVII.—CONSTITUTION.

The Latin "constitutum" refers to fixing or determining, whether in public ordinance or private affairs. It suggests "statute," but may be a metaphorical fixing of doubtful or disputed matter. It means a law or decree (Ducange).

The term "constitutio" means "a definition," and was applied particularly to the imperial legislation. Whether in the form of edicts or mandates, laying down general rules for the future, or decrees and rescripts deciding particular cases and so creating precedents, constitutions were ordinary forms which law assumes, and so were laws.[2] Skene's *Regiam Majestatem* bears on its title-page "The auld Laws and Constitutions of Scotland." This was merely the adoption of the Imperial Roman title for statutes.

[1] Mackay, *Practice*, i. 391; Dove Wilson, *Practice*, 106.

[2] Smith, *Dict. Ant. s.v.*

We may also refer to the "Constitutions of Clarendon," which was a statute.

"The Constitution" now commonly means the fundamental law of a State (*cf.* Blackstone, i. 233, &c.). We find the French Code preceded by "Dispositions Constitutionelles" and "Lois Constitutionelles." The Belgian Code has simply "Constitution de la Belgique," which was made law by a decree. The Italian has "Statuto Fondamentale." All these and also the American Constitution are written. "The British Constitution" is part of the common law (Bouvier's *Dict. s.v.*; Dicey, *Law of Constitution*).

The name is also applied to the fundamental law of other bodies, such as conciliation boards (59 and 60 Vict. c. 30, sect. 1 (2), "Constitution, byelaws, and regulations"). The application of the word to the written document containing the laws of the Constitution is similar to the other cases already noticed of a similar usage.

SECT. XXXVIII.—STATUTE.

The word "statute" is not used in this sense in classical Latin, nor does it occur even in the Latin Vulgate. But it is found in Diocletian's celebrated Edict on Prices, published in A.D. 301 (*Corp. Inscr. Lat.* iii. 805), and in the *Digest*, in the title "Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur" (2, 2), there is a quotation from the Edict in which the words occur, "si quid in aliquem novi juris statuerit," and the word in question is commented on by Ulpian. It has here a judicial reference (L. 46 D. *de V. S.* (50, 16)). We know that the Twelve Tables and the Edict were set up in the forum, and the transition would be easy from the physical setting up of the tablet containing the provision to the enactment of the provision itself. The oldest code known, that of Khammurabi, is engraved on a block of stone about 8 feet high, now in the Louvre (Johns, *The Oldest Code*, p. ix.). In the usages of the verb "statuo" we may trace the transition from physical to ideal and back again.

In mediæval usage the word "statutum" itself is not explained as a statute in our sense, but as a local custom. This is the meaning of the word in the early treatises on private international law—*De Statutis.*—(Paul Voet, &c. Story, *Conflict of Laws*, § 12.) So Ducange gives "statutarius" as a magistrate who pronounces edicts or *statuta* or maintains the law.

In 1267, in the preamble of the statute of Marlborough, 52 Hen. III., the word "statuta" occurs along with "provisiones, ordinationes." In this preamble we have the phrase "provided, agreed, and ordained," showing a point of contact between public and private right. It is said that what appears as the *Statutum Hiberniæ* (14 Hen. III.) in the Statutes at Large is in the old abridgment declared not to be a statute. Statute is here used for an Act of Parliament.

Paul Voet, in his treatise *De Statutis eorumque concursu*, published at Amsterdam in 1661, defines "statutum" as "Jus particulare ab alio legislatore quam imperatore constitutum."[1] He distinguishes it from law proper, but comes to the conclusion that it is part of the *jus scriptum* and true law within the limited territory to which it applies.

In everyday use "The Statutes at Large" are Acts of Parliament—laws. Several statutes upon one subject are read as *one* statute (*M'William* v. *Adams*, 1852, 1 Macq., p. 141), and the whole body of statutes is "statute law." In some universities the rules, regulations, ordinances as to graduation and other matters are called statutes.

The Dutch word *placaat* is a modern word with a similar origin. It is a placard, a bill, and hence an edict, an ordinance of the government—a law.—(*Thurburn* v. *Steward*, L.R. 3 P.C. 478; *cf.* Cowel, Tomlin, *s.v.* "Placard").[2] In English usage the word "placard" occurs as meaning a licence—a title.

[1] iv. 1, 2.

[2] Through the kindness of Professor Nys of Brussels I am enabled to refer to Van Dale, *Groot Woordenboek der Nederlandsche taal*, 4th ed. 1898, and Auguste Scheler, *Le dictionnaire d'étymologie française*, *s.vv.*

SECT. XXXIX.—ACT.

(1.) An act is something done, or the doing of something, by a self-conscious being. The word is also applied to events, as in the English legal phrase, "the act of God," for *vis major* in the Roman law. These associations are physical.

(2.) An act being the deed of a self-conscious person, takes its character in part from the intention (*mens*) of the person. And if it affects society at large, the State and the law will characterise it from the point of view of the public interest. Thus in England we have "an act of bankruptcy." Throughout the Criminal Procedure (Scotland) Act, 1887, the word "act" is constantly used, referring sometimes to the completed crime, or to a particular element thereof (*e.g.*, sect. 6.) The crime as an act is thus analysed into several acts.

(3.) All the technical usages are traceable to the Roman law. By etymology the word is connected with *agere*, *actio* (p. 51, *supra*), *actor* (an agent or commissioner). *Agere* referred both to judicial and extrajudicial transactions. The words of Gaius, in L. 4 D. *de fide instrumentorum, &c.* (22, 4), show the transition from the one to the other. In Roman usage *actum* meant a public transaction in the Senate, before the people, or a single magistrate (Lewis and Short, *s.v.* "Agere"). "Acta" occurs frequently referring to public records or judicial proceedings.—(*Eid. ib.*; Moyle's *Justinian*, 2nd ed. 143.) Many examples will be found in L. 45 D. *de jure fisci* (49, 14). Paul says:—"Mandari potest procuratio præsenti et nudis verbis et per litteras et per nuntium et *apud acta præsidis et magistratus.*"—(*Sent.* i. 3, 1. *Cf.* Calvinus and Brissonius, *s.v.* "Agere"). A legislative reference will be found in the "Acta de pace Constantiæ," dated 1183 A.D., and sometimes printed at the end of the *Corpus Juris Civilis*; the clause at the end "acta sunt hæc," explains this (Ducange, *s.v.* "Actum.") This usage survives in English, French, and German in International

Law, as when we speak of the "Acts of the Congress of Vienna." "The Final Act of the Congress of the Hague," &c.

(4.) The word "acta" was adopted by the Canon law in the sense of judicial proceedings. Thus in the Decretals of Gregory IX. (ii. 19, 11), directions are given that the judge is to employ some public person to keep a record of judicial proceedings—

"Aut duos viros idoneos, qui fideliter *universa judicii acta* conscribant, videlicet, citationes et dilationes, recusationes et exceptiones, petitiones et responsiones, interrogationes et confessiones, testium depositiones et instrumentorum productiones, interlocutiones et appellationes, renunciationes, conclusiones et cetera, quæ occurrerint," &c.

Mr. Reichel devotes a chapter to "acts in judgment."—(*Canon Law*, ii. 262). English ecclesiastical procedure still speaks of an "Act on Petition," which is a summary mode of proceeding for adjudication of incidental matters.—(Phillimore, *Eccl. Law*, 2nd ed. ii. 965. *Cf.* Bouvier's *Law Dict., s.v.*; *Select Pleas in the Court of Admiralty* (Selden Society), I. p. lxii., "Act Books.") Even Scottish Presbyterians speak of "citation *apud acta*."—(*Practice of the Free Church of Scotland*, 2nd ed. pp. 104, 110). The best known use of the word in ecclesiastical history is the *auto da fe* of the Spanish Inquisition.

(5.) In French law "Acte" is a writing, which is evidence of something being said, done, or agreed, corresponding to the Latin *instrumentum* (Merlin, *Rép. de Jur., s.v.*) This usage runs through all the French Codes. We have *actes de l'état civil*; *l'acte authentique*; *l'acte sous seing privé*; *actes d'instruction*, and many others. This refers to a solemn act generally by an official. In Germany the documents filed with reference to registered titles to land are called "Acten" (Report as to Registration of Titles to Land, 1896 [c. 8139], pp. 27, 28). The notarial "instrument" in daily use in Scots conveyancing carries us back to the Roman law, as in the title quoted above, but the Scottish

notary down to 1845 described himself in his docquet as an ecclesiastical officer.

(6.) Scots law retains all the foregoing usages, though some are less common than they were at the beginning of last century.—(*Jur. Styles*, 3rd ed., Index). Popular usage is illustrated in the criminal statute already quoted. The Stamp Act, 1891, which is a British statute, imposes duties on "Notarial Acts," including protests and instruments, *e.g.*, "an act of honour" in the law of bills of exchange. This is the French usage. In early Scots procedure which was largely modelled on the Canon law, the judgment dealing with proof was called an "act" (Mackay, *Practice*, ii. 17; Stair, iv. 39, 5). In some Sheriff Courts the book in which interlocutors and orders are noted for publication is called "The Act Book." The Sheriff Courts (Scotland) Extracts Act, 1892, sect. 3, defines "decree" as including "any judgment, deliverance, interlocutor, *act*, order, finding, or authority which may be extracted." The schedules give several examples of acts.—(*Cf.* Sheriff Courts Act, 1876, sect. 51: "acts, orders, judgments;" Act of Sederunt 8th Jan. 1881, sect. 1—"Acts of the Court of Session, &c.") The document evidencing the decree is in certain cases called "an Act," the most common example being the Act and Warrant of confirmation in favour of a trustee in bankruptcy (Bankruptcy (Scotland) Act, 1856, sect. 102; Titles to Land Consolidation (Scotland) Act, 1868, sect. 25, and Sch. (O); Minute-Book of Court of Session, *passim; cf.* "Act of Warding," Green's *Encycl.*, *s.v.*) Another usage, which appears to be a Scotticism, is the offer in notes of suspension "to find caution *acted* in your Lordships' books" (Act of Sederunt 24th Dec. 1838). In the bond of caution the surety "*enacts*, binds, and obliges himself." And in the minute of preference at a voluntary sale of lands the purchaser "enacts himself" as such.—(*Juridical Styles*, 5th ed. i. 83: but *cf.* iii. 471, and 3rd ed. i. p. 96; Neill's *Maritime Forms*, pp. 95 and 96). The idea which runs through all these meanings is the solemnity of the act or deed.

To this it may be added that in English law in the phrase "act and deed" the words are synonymous (Sweet, *s.v.*). Scots law uses the word "deed" for a private act in writing.

(7.) Statutes are called Acts of Parliament. This usage in England appears to correspond with the change in parliamentary practice from procedure by petition to the King to amend the law to procedure by bill by the Lords or Commons.—(Hearn, *Government of England*, p. 58; Statutes at Large, preface; Anson, *Law and Custom of the Constitution*, 2nd ed., part i., p. 9). An "act" is now commonly used in this sense. We classify statutes according to the interests involved, as "Public Acts," "Private Acts," "Local Acts," and speak of "Printed Acts," and copies thereof.—(*Cf.* Ilbert's *Methods of Legislation*, p. 26, &c.) We also classify them according to the legislative body which enacts them—American Acts of Congress: Acts of Sederunt of the Scottish Court of Session, which formerly dealt occasionally with substantive law, but are now merely laws like the English Rules of Court; Acts of Adjournal, similar laws enacted by the High Court of Justiciary in Scotland; and Acts of the General Assembly of the Church of Scotland.

(8.) The word is also applied to acts of the Sovereign in administration, in the phrase "Act of State" (*Poll* v. *Lord Advocate*, 1897, 1 Fraser, 823).

SECT. XL.—DEFINITIONS.

The words for law which we have hitherto examined take their origin generally in judicial process or forms of legislation. We now come to words which refer rather to the matter of the law.[1] The Pandects, and in imitation of them the Decretals of Gregory IX. and of Boniface VIII., conclude with two long miscellaneous titles, which are still of value to the practising lawyer, and are familiar to the student, the first, *De Verborum Significatione*, and the second, *De Diversis Regulis Juris*

[1] See note 3, p. 288.

Antiqui—all of which are collections of *laws*, and merit special attention. Definition and Rule were treated as synonymous in the Roman law. Papinian wrote a book of Rules under the name of Definitions.—(Pothier, *Pandects*, Lib. 50, t. 17, Reg. Gen. ii.) The title of the Code (vi. 38) corresponding to that already referred to in the Digest is "De Verborum et Rerum Significatione."[1]

The definition of special words, though said to be dangerous (L. 202, D. *de R.J.*) is a special form of setting up the landmark. Language is the vehicle of legal as well as of everyday thought, must be used intelligently, and must be intelligible to the hearer. Usage—custom—is the very foundation of language, but when words come to be used in legal transactions and proceedings they necessarily take a peculiar meaning. Definition is necessary and useful, for it prevents disputes or solves them when they arise—is in fact law;[2] and the only dangers are loose or hasty definition, and the pressing of definitions, like maxims, into uses for which they were not originally intended. A court in applying a definition will keep this in view, and do as was done in the Scots case *M'Kinlay*, 14 D. at p. 164, where "merchants," was applied to the small retail dealers intended by the Legislature, who are still in Scotland known by that title.[3]

Under the English system of precedents a word once interpreted by the courts tends to take the judicial meaning ever afterwards. Such twisting of words is seen in the Scots decisions as to the meaning of the words, "To A. in liferent and his children in fee," where the fee is held to be in A. We have now collections of judicial decisions in our Digests[4] under the title "words." The practising lawyer knows how to use the words "child," "family," "issue," and such-

[1] The exposition of Alberico Gentili in his commentary on this title of the Pandects (Hanoviæ, 1614) may be referred to.

[2] See Bills of Exchange Act, secs. 3, 17, &c.

[3] See the words "house" and "tenement" in *Grant* v. *Langston*, 1900, 2 F. (H.L.) 49.

[4] Stroud's *Judicial Dictionary*.

like.[1] If the interpretation is inconvenient or unjust, the Legislature must interfere.

In recent practice it has been found a convenient way of simplifying Acts of Parliament and similar statutes to give interpretation clauses—many of great length; and the Legislature has passed a general Act containing a great number of definitions, the Interpretation Act, 1889 (52 and 53 Vict. c. 63), which is often forgotten by Parliament itself. These definitions are truly laws.—(See Green's *Encycl.*, *s.v.* "Statute Law.") They may be regarded as artificial, as opposed to natural and customary definitions.

The Orders of the Commissioners under the Local Government (Scotland) Act, 1889, fixing the boundaries of counties and parishes in Scotland are "definitions" both in the original and in the derivative sense. The later physical application of the term may be seen in its application to the proposition itself, which embodies the legal definition.

SECT. XLI.—RULE.

The second title to which reference was made in last section is *De Diversis Regulis Juris Antiqui.* The Greek word *κανών* probably gives us the key to the legal associations of the word "Rule." Κανών was the reed used in the measuring of land. The associations are the same as *νομος*, allotment of land, definition, terminus, boundary stone. In Babylonian documents, as we have already seen, there are careful measurements in descriptions of lands, and in the Michaux Stone we find mention of a person, "the measurer of the field."—(*Records of the Past*, ix. 98; *cf.* p. 152, *supra.*)

It was therefore the measuring rod—the rule—which enabled men to define their lands and their rights. As we have seen, the land measurer was a sort of judge, whose office demanded practical skill and high integrity. An enumeration of his qualifications is given in the treatise ascribed to

[1] The remarks of Lord Rutherfurd Clark in *Bryson* v. *Munro's Trs.*, 1893, 20 R. 986, are unfair to the conveyancer.

Frontinus,[1] who enumerates fifteen causes of dispute as to land. What must they have been in Babylonia and Egypt, when agriculture was the chief national industry!

Regula suggests a machine—a ruler to draw straight lines—which was perhaps used by judges to keep themselves as well as litigants straight. So it has been said "'Canon law' is neither more nor less than a rule, because it is intended 'to keep a man straight' (in faith as well as practice) 'drawing him neither on one side or the other, but rather that which correcteth that which is out of level or line.'" The last words are quoted from Sir Thomas Ridley (Dodd, *Canon Law*, 56).

In the first text of the title now under consideration, Paul defines "Regula" thus,—"Regula est quæ rem quæ est breviter enarrat. Non ex regula jus sumatur, sed ex jure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causæ conjectio est, quæ simul cum in aliquo vitiata est, perdit officium suum." As the preceding title dealt with words and names, this attempts to deal with things and facts. The rule is not law of itself, but a short pithy statement of some result of law. But when Tribonian collected the 211 texts which form this title and put them into Justinian's Pandects, they became law, and have ever since been so treated by civilians.[2]

All the great Roman jurists composed books of "Regulæ." We find an example of how a *regula* was treated in Celsus' exposition of the *Regula Catoniana* (D. 34, 7)—the rule that if a legacy would have been useless if the testator had died the moment after executing the testament, it could not subsequently be cured by change of circumstances. This rule is there modified and explained. But in the Pandects, as observed already, *Regulæ* are made law.

Gaius in his *Institutes* (i. 83, 84, 85; ii. 68, 78, &c.) applies the word to laws of nations and of nature. Such

[1] P. 41, *supra*. See also the references to *arbitri* and *mensor* in Ll. 7 *et* 8, D. *Fin. reg.* (10, 1).

[2] Bankton (*Inst.* iii. pp. 45, 108) says that Paul's warning still applies to maxims or rules.

a rule was a concrete application of some general equitable and reasonable principle. Cicero (*De leg.*, i. 6, 19) identifies law (*Lex*) with abstract rule—"juris atque injuriæ *regula*." —(*Cf.* Horace, *Sat.* i, 3, 118.)

The Greek word for Regula—κανών—was applied to the rules laid down by the Church Councils for the regulation of their affairs and the faith of the Church. Justinian in his 131st Novel (περὶ τῶν ἐκκλησιαστικῶν κανόνων, κ.τ.λ.) dealt with these and enacted that the *Canons* of the Councils of Nicæa, Constantinople, Ephesus, and Chalcedon should have the force of *Laws* (vicem legum obtinere sanctas ecclesiasticas regulas, &c.—τάξιν νόμων ἐπέχειν τοὺς ἁγίους ἐκκλησιαστικοὺς κανόνας, κ.τ.λ.) This Novel may be taken as the first chapter in the history of "the Canon law."

Isidore of Seville repeats the fact "Canon Græce, Latine regula nuncupatur," and defines "Regula" thus: "Regula dicta est eo quod recte ducit, nec aliquando aliorsum trahit. Alii dixerunt regulam dictam, vel quod regat, vel normam recte vivendi prebeat, vel quod distortum pravumque est corrigat."—(*Decr. Grat.* I. iii. 1 and 2.) Whereas the Civil law treats *Regula* as a form, the Canon law looks at it as embodying the matter of the law. The former is purely legal and formal, the latter is moral and substantive. Gratian quotes Isidore in the *Decretum* (*l.c.*), and adds that some canons are decrees of the Pontiffs and some statutes of Councils. "Canon" and "Regula" are now true statute law of the Church. This was embodied in the *Corpus Juris Canonici*; and might be divided like the municipal law into civil and criminal law, procedure, &c. The phrase "Canon law" is like "Statute law" and others. It is a body of law composed of Canons. This is the later physical application of the term. It is also applied outside of law to collections of books—the sacred canon; and to a member of a cathedral chapter—a person with certain rights.

In modern usage in England the phrase "Canon law" is applied in a narrower sense to the ecclesiastical as distin-

guished from the municipal law. It applies only to Christians in their spiritual affairs.—(Dodd, *op. cit.* 56; "The Canon Law and Scottish Presbyterianism," 32 *Journal of Jurisprudence*, 113.)

Our modern law is often spoken of as a body of rules; *e.g.*, G. J. Bell (*Prin.* sect. 1.) "The civil jurisprudence of Scotland comprehends, first, a knowledge of the rules and exceptions relative to civil rights," &c. Particular laws are spoken of as rules, *e.g.*, "the rule of the road"; "the rule of *ex parte* Waring"—a decision of Lord Eldon as to ranking of creditors, which has been followed and applied in England, but does not hold as law in Scotland.[1]

Merlin, in his *Répertoire de jurisprudence* (*s.v.* Règle) says "on entend par règles de droit des principes généraux, qui sont, à peu près, dans la jurisprudence ce que sont les axiomes dans la géométrie." This shows the change of view from the time of Paul. Merlin gives a translation of all the *regulæ juris* in the Pandects and the Decretals, and concludes by saying that in his day there were true rules of law contained in the French Codes—in a word the general laws of France.

And in recent statutes, as we have noticed before, enactments are made in the form of rules either to guide the parties in their conduct, so as to protect their rights, or determine their duties (Bills of Exchange Act, 1882, sect. 41); or to enable the judges to decide points when they arise, and so indirectly to enable the parties to regulate their conduct accordingly (Partnership Act, sect. 2; Sale of Goods Act, sects. 18 and 29.) In these Acts rules are laws.

The English laws of procedure are mainly contained in Rules of Court made by the Lord Chancellor and certain other persons under the Appellate Jurisdiction Act, 1876. These also are true laws, and are due to legislation of the same kind as Scottish Acts of Sederunt. But in the Ballot Act,

[1] Royal Bank *v.* Commercial Bank of Scotland, 1882, 7 App. Ca. at p. 383 (Lord Selbo.· e, L.C.)

1872, a large portion of the law is contained in "Rules" in schedules appended to the Act and incorporated with it. It has been held that these rules are merely directory; that is to say, slight deviations are immaterial.[1]

In the Elementary School Teachers' (Superannuation) Act, 1898, the Treasury and the Education Department are empowered to make "Rules," which must be laid before Parliament. The "Rules" enacted are precisely in the form of a statute.—(Nelson's *Annotated Scotch Code*, Appendices.) All such legislation is regulated by the "Act for the publication of Statutory Rules" (56 and 57 Vict. c. 66).

"A Rule of Court" is also applied in English practice to a single Order, *e.g.*, in the fictitious action of trespass in ejectment.[2] The following quotation is from Coke's Commentary on the Statute of Marlborough:—

> "In open court, where the parties, counsel, and attorneys attend, ought orders, *rules*, awards, and judgments to be made and given . . . Nay, that judge that *ruleth* or ordereth a cause in his chamber, though his order or *rule* be just, yet offendeth he the law, . . . because he doth it not in court."—(2nd Inst., p. 103.)

In Scottish procedure it occurs in applications for new trials in jury procedure. "When the party against whom the verdict has been found intends, without lodging a bill of exceptions, to apply for a new trial, . . . such party shall give notice of a motion for a rule to show cause why the verdict should not be set aside," &c.—(A. S. 16th Feb. 1841, sect. 36: "[Rules] as to applying for a new trial.") The Court after hearing may discharge the rule; or they may "make it absolute," by setting aside the verdict and granting a new trial.

The word "Rule" is also applied to propositions which are not judicial or legislative, but partake of the nature and form of law (*cf.* Merlin, *Rép. de Jur.*, *s.v.* Règle, Arrêt, &c.) So it is applied to the extrajudicial stipulations and con-

[1] Phillips, 17 Q.B.D. at p. 812.

[2] Blackstone, iii. 203, xi.; Stephen, iii. 629.

ditions for average in the "York-Antwerp rules" of the International Law Association; and the "Glasgow Marine Insurance Rules, 1901." The individuals who contract make these law for their special contracts. If they are universally adopted, they may not be technically, but they will be really law.[1]

Rule is still used in the general sense of law, but rather with the political reference to government, as in the word "Ruler." The phrase "bear rule" illustrates this:—

"Ought, then, the respectable classes to enjoy rule and supreme power?"—(Weldon's *Politics of Aristotle*, 128.)

SECT. XLII.—REGULATION.

"Regulation" is a later derivative from the Latin *regula*. It frequently occurs in the sense of rules made for future guidance, but it is often impossible to distinguish regulations from rules. Thus in the Trusts (Scotland) Act, 1867, sect. 16, the powers of the Court are said to be subject to certain "rules and regulations," and when we turn to the preamble of the Act of Sederunt referred to in this section (15th July 1865), we find provisions called "Regulations," which in England are called "Rules of Court."[2] The Ordinances of the Scottish Universities Commissioners (which are law) are generally described as embodying "Regulations" for particular subjects (pp. 313-314, *infra*).

The Army Act uses both terms in different connections. Section 70 gives Her Majesty power to make "rules of procedure," which are to be laid before Parliament. Section 71 declares that she may make "regulations" as to the persons to be invested as officers with command. By sect. 93 a Secretary of State may make "regulations" as to enlistment. And by the Regimental Debts Act, 1893, sect. 13, the Queen may by Royal Warrant make "regulations," which are to be published and laid before Parliament. There

[1] Report of Twentieth Conference, p. 213.

[2] *Cf.* The Small Holdings Act, 1892, sect. 6 (Regulations), sect. 7 (Rules by County Council.)

is a well-known volume "The King's Regulations and Orders for the Army," which contains a code of law for the use of the Army. It is law, for it deals with rights and duties in all their aspects. On opening any of these military volumes at random, we are struck by the fact that the laws are not expressed as commands in the imperative mood. It is not "shall" or "must," but "will":—

"2077.—Demands and requisitions *will* be made out in ink, and signed by the officer who is responsible for them."

The use of the indicative mood, present or future, is explained by the fact that the regulations are addressed to persons who wish to obey the law. The rules are their own, and they follow them willingly.—(*Cf.* p. 171, *supra*). The law imperative with sanctions is behind and concealed, and behind this is the force of the opinion and good-will of the society to which the soldier belongs, who would regard retiral or expulsion as disgrace. In the construction of the legal machine, sufficient motive power is found in the sense of discipline of the soldier. He asks what is to be done, and accepts the directions in the regulations. So in the Ballot Act of 1872 the directions for voters are in the indicative mood. In the body of the Act they are imperative, but for the guidance of the law-abiding citizen the other way is simpler and not offensive to his dignity. The same remark applies to conveyancing law and law of procedure. These are true law, but they are as it were one remove from the rights which they are designed to protect. They are for the most part conventional and arbitrary, but must be followed in the interests of justice and order. A popular example may be found in the Post-Office Quarterly Guide. The law is embodied in Acts of Parliament and Orders in Council, but the guide gives regulations, directions, and advice to persons who wish letters to arrive without delay at their destination. This is an art of conveyancing founded on post-office law, like the land conveyancing which is founded on the land laws.

SECT. XLIII.—ORDER.

We frequently meet the word "order" in connection with rule. This chapter commenced by accepting the etymology from "orior," with the explanation that it described the seats in rows of a theatre, rising up gradually. We may now notice the legal usages. In classical Latin it was applied to military ranks, and Cæsar uses "ordines" for commanding officers. The *ordo equester* was a similar usage which still survives in "holy orders," "monastic orders," &c., and the word "ordain."[1] Ducange explains "ordo" by "regula," "canon," &c.

Orders[2] in Council are a familiar form of British legislation and are now published by authority in the same form as the statutes. It is generally a delegation of legislative power by Parliament to a special department. Such are "Provisional Orders" obtained from a Government Department to be confirmed by Parliament, and this is now the form adopted to supersede Private Bill legislation in Scotland.—(62 and 63 Vict. c. 47, sect. 15.)

An Order may be a temporary law laid down by a local authority.—(*Baikie*, 1901, 3 F. (Just.) 54.)

The House of Lords in its appellate jurisdiction may issue "Orders" appointing sittings, and the Court of Appeal may do so also as to the conduct of business. These "Orders" deal with administration and are distinct from the "Rules," but they too affect rights and are really laws.—(Appellate Jurisdiction Act, 1876, sects. 8 and 16.)

Army Orders may be His Majesty's regulations, general, or garrison orders (Army Act, sect. 11), whereas the word "command" is applied to specific Orders (sect. 9). Army Orders are evidence of the matters and things therein directed to be stated by the Act (sect. 163 (*e*); *Manual of Military Law* (1894), p. 350).

"Order" is applied to the decree of a Court in England, a usage which has been partially adopted in Scotland, *e.g.*, a

[1] Note p. 314, *infra*.

[2] *Cf.* Medical Act, 1886, sect. 22 (2).

winding-up order under the Companies Acts.[1] Sweet (*Dict. s.v.*) explains that "as a general rule 'order' is opposed to 'judgment,' and therefore denotes (1) orders made in summary proceedings . . . , and (2) orders made in actions or interlocutory applications." Such orders are commands of general or particular application. An order of Court may be a title or may impose liability. So also may an 'order' in trade. This has wandered far from the original etymology, though the transition of ideas is sufficiently obvious. Again, the abstract order to pay a sum of money, when issued by the post-office in a certain legal form becomes identified with a document in the phrase "money order." This is a title, a right, a thing, a chose in action.

In the phrase "the order and disposition" of a bankrupt the word comes nearly to meaning power or right.—(Bell, *Com.* i. 270; Stephen, *Com.* 12th ed. ii. 160).

The laws which regulate Parliamentary procedure are called "standing orders," and "a point of order" in Parliament is simply a point of law in procedure.—(House of Commons debate, *Times*, 20th February 1901.) A point of "order" differs from a question of privilege.

Derived from "ordo" comes "ordinance." Several collections of law are known by this name—the laws of the Hanseatic Towns and the *Ordonnance de la marine* of Louis XIV.—(Bell, *Com.* i. 548). Coke distinguishes a statute and an ordinance in that the latter has not had the assent of the King, Lords, and Commons, but is made merely by two of these authorities.[2]

The legislation of some British colonies (*e.g.*, Hong Kong, Malta)[3] is published as ordinances, which ordinances are in the form of British statutes.

The legislation as to the Scottish universities already mentioned is a volume of ordinances, the legal character of

[1] Buckle, *passim*; Mackay, *Practice*, ii. 398; Crofters Holdings (Scotland) Act, 1886, sects. 12, 28, &c.

[2] 4 *Inst.* 25; Bouvier, *s.v.*; Merlin, *Rép. de Jur. s.v.*

[3] *Cf.* 50 and 51 Vict. c. 54, sect. 7 (*a*).

which is discussed by the House of Lords in *Metcalfe* v. *Cox*, 1895, A.C. 328. These are framed and construed as statutes.—(*Johnston* v. *The University of Glasgow*, 7 S.L.T., p. 407.)

In French procedure *ordonnance* is applied to the orders of single judges in certain cases.—(Merlin.)

Again, the word "ordain" is used in the ordinary Scots summons as synonymous with "decern" in the conclusion that the defender "ought and should be decerned and *ordained*" to pay, &c.—(P. 293, *supra*).[1]

SECT. XLIV.—ETIQUETTE.

The world of fashion and some other small worlds are ruled by a special law, which is etiquette. This word means the ticket which determines the order of precedence. It may either be the ticket placed on the seat or the ticket given as a title to the privileged person.—(Littré, Skeat, *s.v.*). In the legal and the medical professions it may operate as true law. We may have points of etiquette as to accepting or refusing fees, or doing or refusing to do particular work, like points of law decided by a dean or by a committee as a tribunal and enforced by the public opinion of the body to which the individual belongs, with the ultimate sanction of expulsion and ruin. There is a small code of etiquette, expressed in ordinary legal language, dealing with the rights and duties of counsel with regard to fees and retainers, and the duties of senior and junior counsel. As the relations become complicated, so do the laws.—(Snow's *Annual Practice*, 1903, ii. 631; *Parliament-House Book*, G. 23.) The "gentleman"—the ordinary man—obeys the rules naturally and feels no constraint. He anticipates as the good citizen in the state the decision of the tribunal, and may even be more punctilious than the average member. His code of etiquette may, like his moral code, be higher than that of some of his fellows,

[1] This imports an obligation; when a licentiate is "ordained to preach," it imports in the general view a right as well as a duty.

while not so high as that of others. We may see etiquette merging into law in the case of the General Medical Council sitting judicially on questions of "infamous conduct in any professional respect."—(21 and 22 Vict. c. 90, sect. 29.) This is similar to the relation between church law and municipal law. The same relation is also illustrated in naval and military courts.[1] All these are courts with a special jurisdiction of their own.

SECT. XLV.—SUMMARY.

We have seen right appearing in the double form of right in general and "a right" in particular, determined in space and time. We have seen also "an obligation" widened and transmuted into "obligation" in general. So also a duty—a single actual prestation defined in space and time becomes "duty," the generalised idea of what man ought to live for. So with law. It may be that it starts from the particular—"a law" defined in space and time—an actual decree engraved on a pillar, which may require also physical reading and proclamation, but operating only within a special limited territory, or applying only to a definitely related group of men; it inevitably ends with the general idea of law—the something which underlies all laws—the true essence of law, and not mere accidents—true justice and wisdom, and not merely caprice of a ruler—the idea to which the ruler appeals when he legislates, like the ideas to which he appeals when he paints pictures or writes verses. The general development is from some rude physical or material form, through an abstract intellectual idea into another physical embodiment, in many cases the written document which sets forth the law, or the persons or the institution which administer it.

But assume that it starts from the general idea, law means that general restraining force which keeps society

[1] See pp. 224, 226, 269 as to Hindu and Mohammedan law and others in relation to commercial and family law.

together. This can only be seen and felt in a physical embodiment; and so each statute becomes a "law," divided and defined in space and time, like separate rights and separate duties. Our word "law" has adopted, in addition to its own meanings, the meanings of the Latin *jus*, with the exception of right in the so-called subjective sense. If, again, the word law starts from legislation, the meanings develop in two directions. It goes back to the authority who gives power to legislate, till we reach legislation "before the foundation of the world." It follows the result of legislation into the decisions of the courts or the acts of private individuals in the most minute details. As we formerly traced back a right through an infinite series of rights (p. 121, *supra*), and an obligation through general obligations to an original duty (p. 199, *supra*), so now we find a series of ever-widening circles of law, starting from the centre of the concrete decision, and losing themselves in infinity. So

> "Each unit in the series that begins
> With God's Throne ends with the tribunal here."
> (Browning, *The Ring and the Book*, v. 1769.)

Hence the English word "law" has been used and still is used in almost all the following senses:[1]—

(1.) A rule, or a body of rules, formerly traditional, definitely expressed and published, in order to guide judges in the administration of justice: *The Laws of Moses*; *The Laws of King William the Conqueror*; "*Instruction for Judges*" (Sigel, *Slavonic Law*, 18).

(2.) An enactment, edict, decree, constitution, or statute altering, amending, or improving such rules.—(Blue-Book, South Africa, July 1901 (Cd. 714), pp. 39, 46, &c.) The use of writing is originally designed merely to afford evidence of the law, now it constitutes the law. A similar distinction prevails as to private deeds.

(3.) Any enactment of a legislative body, whatever its

[1] *Cf.* Murray's *Dictionary*, *s.v.*

purpose, if written: "*Expiring Laws Continuance Act*, 1902." "Laws" here means "Acts of Parliament."

(4.) Any section or distinct proposition from such an enactment.—(*Cf.* Article 2 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuche für das Deutsche Reich*, "Gesetz im Sinne des Bürgerlichen Gesetzbuchs und dieses Gesetzes ist jede Rechtsnorm.")

(5.) A similar proposition which may be expressed in words though not written: *Common Law.*

(6.) A group of such rules applicable to a special country or a special subject: *The Law of Scotland; Law of Heritable Property; Law of Agency; Law of Husband and Wife.*

(7.) Similar rules for private citizens: *Conveyancing Laws; Bills of Exchange Act; Sale of Goods Act; Laws of Whist* (Cavendish); *Laws of Chess*, &c.

(8.) Rights or a right resulting from law: *amittere legem terræ* (Glanvill, ii. 3). Beames translates, "He shall lose his law," *i.e.*, the loser in the combat is outlawed, or loses certain rights of law. So Blackstone (iv. 136) says that conspirators "were by the ancient common law to receive what is called the *villenous* judgment, viz., to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses," &c.; and hence

(9.) The remedy or procedure given by law.—*Wager of Law* (Pollock and Maitland, ii. 600.) In the *Assize of Clarendon*, sects. 3 and 4, "facere suam legem" means to pass his ordeal—his legal trial. So in the *Dialogus de Scaccario*, ii. 7, we find "judicia vero, leges candentis ferri vel aquæ."—(Stubbs, *Select Charters*, 8th ed. 221.) "He was to put in sureties or *vadios* that at such a day he will make his law; that is, take the benefit which the law has allowed him."—(Blackstone, iii. 341.)

(10.) The decision of a particular case by a court:—

"That decision stands perfect and complete law."—(*Per* Cairns, L.C., in *Phosphate Sewage Co.*, 4 App. Ca. 810; *cf.* Hobbes, p. 399, *infra.*)

(11.) The terms of a private contract, deed of conveyance, or trust-deed :—

"Law of the Tenement."—(Bell's *Prin.* 10th ed., 1086.)

"The purposes, if clearly expressed either in the trust-deed or in a separate lawful deed, give the law of the trust."—(*Ibid.* 1997.)

In this usage and the last, law may coincide with *title*, though in a very wide sense all laws are titles (p. 171, *supra*).

(12.) The fundamental principle underlying all particular laws :—*Rule ; Order ; The Law of God ; The Moral Law.*—(Westminster Confession, Chap. xix.) In the English liturgy each of the Ten Commandments is called a law.

(13.) The State—the Court—representing the physical force behind the principle :—

"You my judges and last hope !
You are the law : 'tis to the law I look,"
(Browning, *The Ring and the Book*, v. 1748, and *passim.*)

(14.) A thing—a commodity, supplied by rulers in an economic sense—*Cheap law ; speedy justice* :—

"We shall neither sell right nor justice."—(*Magna Charta.*)

"By defending property, by diminishing the price of law," &c.—(Macaulay's *Essays*, Southey, *ad fin.*)

Here law is regarded as an *interest* of the public, or of private persons.

The various meanings of the word law may also be classified as rights and obligations have already been arranged.—(*Cf.* pp. 50 and 157) :—

1. From the point of view of the judge.—*Decrees ; dooms ; judgments ; orders* (*interlocutory or final*), *Acts of Court, &c.*
2. From the point of view of the legislature, anticipating (*a*) the decision of disputes ; and (*b*) their absolute prevention so far as possible.—*Statutes ; Acts ; rules ; regulations ; orders ; ordinances.*
3. As evidence of law.—*Written statutes, &c. ; precedents, &c. ; titles ; obligations.*
4. As the object of judgment.—*Rights, &c. ; debt ; obligations ; liabilities ; order.*

5. As special laws.—*Constitutional; parliamentary; ecclesiastical; military, &c.*
6. As negative laws.—*Interdicts; Prohibitory orders.*
7. From the point of view of the claimant in litigation law is (*a*) a system of rights; and (*b*) the means of enforcing the same.
8. From the point of view of the debtor or respondent law is (*a*) a system of duties, burdens, and liabilities; and (*b*) the burden and liability to endure enforcement.
9. From the point of view of society and the state.—*Law; order; justice; reasonableness, &c.*

What, then, is the central idea running through all the meanings of law?

A rule? This is merely a protest against caprice, a definition for a purpose, like some of the theological propositions in the creeds. Mere rule is often the refuge of craft or stupidity, for the definition is adapted to facts by making the same rule apply, *if all the circumstances are identical.* But circumstances are never identical, and so our rule of law must always be different if it is to be just. When rules become too general, like maxims, they become useless.

A command or a sanction? The command and the sanction may both be resolved into some final physical fact of nature—a law of nature which we cannot disobey if we tried, such as the necessity of living on the earth and not in the water, of taking food to sustain life, and so forth. We have seen that in modern law criminals are fewer, and even litigation is disappearing. On the West Coast of Africa litigation is popular as a substitute for fighting. The command "don't fight" merely forces the nervous energy of men to find another outlet.—(*Jur. Rev.* i. 272.) Command and sanction are only one aspect of physical embodiment, they presuppose a material on which they act.

If it is necessary to have a single definition of a law

in the jural sense, the following may be suggested:—"A law is an assertion[1] which expresses from the standpoint of society or the State the right of one person, or a group or class of persons, and the corresponding duty of another person, group, or class in harmony with the interests of the society or the State itself." This is otherwise expressed:[2]—"Positive laws are the contingent expression of the material rights and mutual limitations of individuals, arising necessarily from the reciprocal relations of human beings in society." This is a formal definition adopting the categories of formal logic. It does not touch except by implication the substance of law, or explain what are in point of fact the interests of society. These differ according to the nature of the society—churches, states, confederations of churches or states, families, armies, trade guilds, merchants, cricket or football teams, even two persons playing cards—any group of self-conscious human beings.

These interests all have a physical embodiment in persons and all that these imply. When one of the individuals or the State itself attempts to change the arrangement, and since life itself is continual change, these rights, duties, and interests call for perpetual readjustment. The machinery by which the change is attempted or the readjustment made is also called law. Law is a mechanical device, in the first place, to prevent friction among men, so as to allow them to devote their energies to ethical, political, economical, scientific, artistic, or religious ends. And in the second place, it may afford positively a material basis or

[1] It is of course in general a proposition also. (See A. Sidgwick, *The Use of Words in Reasoning*, p. 17.) Popular usage identifies legal forms with the documents in which the rights, duties, or laws are set forth. This usage suggests the dispute whether logic is a science of reasoning or of the forms of thought. Should we speak of simple apprehension, judgment and reasoning, or of words, propositions, and syllogisms? Again, is jurisprudence a science of rights or of forms of rights? It will be noticed that the definition of a law here suggested can be readily adapted to the metaphorical laws of science—*i.e.*, general propositions, which reconcile apparent contradictions.—(*Cf.* K. Pearson, *Grammar of Science*, 2nd ed. p. 86.)

[2] Miller, *Philosophy of Law*, p. 314.

material means, which to a certain extent promote these ends directly. What we generally call law is a section cut out of human interests, with which the State considers it expedient to deal, and which it regards as rights and duties.

Laws may, if necessary, be expressed as commands in the imperative mood, because, as we have seen, a legal proposition in defining rights or duties may regard the future and not merely the past. Modern laws in point of fact are generally expressed in the indicative or subjunctive mood. It depends on the historical development of societies whether the laws are addressed to individuals, or groups, or classes. The machinery may include a sanction or artificial motive, but in all societies the laws imposed or recognised are enforced and obeyed without an artificial sanction, because, if men are to live, they must act in some way, and in society it is generally found that the path of law is the path of least resistance.

Ulpian summed up the whole law in three *præcepta juris*,[1] which we may now in conclusion compare with the three elements of right, duty, and law.

Honeste vivere.—Obey the law of the land, whatever shape it may assume—statutes of the legislature, decrees of those in authority, judgments of the Courts, the moral precepts of society, the etiquette of your own world, the solemn contracts into which you have entered. This life of the good citizen (*honestas*) has a twofold legal aspect, negative and positive, in duties, obligations, and bonds; the negative aspect is—

Alterum non lædere.—Abstain from injuring others, high or low, native or foreign, in person or property, in good name or honour. Do not exaggerate your rights till they become wrongs to others—*Summum jus, summa injuria.* And the positive aspect is—

Suum cuique tribuere.—Respect the rights of your indi-

[1] *Cf.* Hastie, *Kant*, p. 54; Demangeat, *Inst.* i. 13; Leibniz, Erdmann, i. 119.

vidual neighbour, of society, and the State. Fulfil all their just claims, whether arising from the relations in which you are placed, or from special undertakings into which you have voluntarily entered. This precept covers obligations *ex contractu*, and similar ones, while *alterum non lædere* refers to obligations *ex delicto* and such-like, but by anticipation in the form of moral duties before the wrong is done and the tie has become a legal obligation.

But underneath all these precepts there is the fundamental assumption of physical life. *Vivere* is a condition of *vivere honeste*. Rights are implied and assumed in the precepts of the law. Life implies an active struggle for rights.[1] And although the Pandects set out with these precepts imposing duties, the scheme of the compilation is the vindication of rights in the form of legal actions and processes. The good citizen must not forget that he, too, has rights, for which he must stand up in the public interest. He is entitled to what law and the State call his own. He is another person whom no one should unjustly injure. If he cowardly abandon his just rights, if he tamely submit to wanton injury, he is disobeying all three precepts at once with regard to his neighbours, is in fact betraying the interests of the State, and hastening the dissolution of society.

[1] Von Ihering, *Der Kampf ums Recht*.

CHAPTER V.

CUSTOM.

SECT. I.—A SOURCE OF LAW.

IN our previous discussion we have taken "law" as primarily representing the physical side in particular of the institution which we know as law in general, a distinction which is hard to draw in English, but appears in French between *Loi* and *Droit*, and in German between *Gesetz* and *Recht*.

"Law" may spring from the written table set up in the Forum, or the march stone set down between boundaries. Why do men set up "statutes"? Why do men respect their neighbours' landmarks?

There are many answers to be found in the nature of man, but one of the most important is *custom*. This deserves special examination as an attempt to place law on a purely physical basis. Custom rules the universe. The planets keep their accustomed spheres; man, civilised and uncivilised, appeals to custom; the highest idea of God is that he cannot change. Custom thus stands midway between the physical and the intellectual side of law. Habit may be taken as one limit, and morality as the other.

SECT. II.—NEWTON'S FIRST LAW OF MOTION.

Not only does the common man assume that the world has always been and will continue indefinitely to be very much what it is now; but the scientist has found it necessary to assume a similar continuity of nature in material things. Such a statement may be found in Newton's first law of motion:—"Every body continues in its state of rest or of

uniform motion in a straight line, except in so far as it is compelled by impressed forces to change this state." This law, though applied by Newton only to the material universe, may be traced through all nature, conscious as well as unconscious, and may be regarded as the physical basis of what appears in law as custom. "Every body" may then mean "everybody." We must assume the "continuity of nature," and here we are at once plunged into metaphysics, for we may ask whether the universe is really persistent, continuous, and eternal; or whether it is not rather changeable, arbitrary, and temporary; and whether the ideas of order and continuity are not added by man in his struggle to comprehend and understand things? Are not these ideas projected into the chaos? Can any individual man understand the universe before he pronounces the arbitrary fiat, "Let there be light"? As we shall see hereafter in our discussion of justice, the Greeks treated the whole universe under legal or political categories (p. 367, *infra*). The very phrase "Law of Nature" implied an idea of continuity. So in more modern times Hooker found a continuity in nature which his assumptions had already put there by implication (p. 440, *infra*). For our present purpose, whether the reality is in mind or in the apparently external universe, we may assume Newton's first law as universally applicable to the world of things, and we now proceed to trace the law as it is developed within consciousness.—(Pearson, *Grammar of Science*, 2nd. ed. p. 322.)

SECT. III.—HABIT.

Habit in its most elementary form is common to man with the lower animals. Professor Lloyd Morgan in his interesting work on *Animal Behaviour* (p. 279), says that "routine in many animals, so often creatures of habit, begets a customary sequence, the breach of which is at once felt." He tells a story of a trainer, who remarked in regard to a collie bitch, "If I put her through her tricks in the usual order she

does them like an angel, but if I try and make her alter the order she snaps and sulks like the devil." We must reject with the learned professor the explanation of outraged justice, which belongs to the world of ideas and conscious ends, and we may accept his explanation that such behaviour is due "to breach of customary routine." The professor gives many examples of instinctive habits in insects and animals, sometimes so strong that they cannot be overcome or modified (*cf. op. cit.* p.77).

Man belongs to the world of things through his body. His body is a complex of habits which are as much a part of him as is his skin. We learn to walk and to speak, and along with these habits we acquire a gait or trick of speech, depending on the shape and strength of our limbs and organs. We learn to use our fingers, and to our ordinary habits we may add skill in some handiwork or in playing a musical instrument. Let any one try in so doing to change his mode of playing and he will find what habit is; at a certain stage change becomes impossible. But habit goes further and affects the mind, our intellectual pursuits, and our moral being. Lazy habits, the drink habit, are merely conspicuous examples. In intellectual habits, the person tends to continue in this "state of rest or of motion in a straight line." At one stage it is hard to break with such habit; at a later stage it may be impossible. It matters not where we draw the line between physiology and psychology. The physiological fact that our fingers grow stiff, that our nervous centres respond to some impulses and resist others, are facts of nature. To outer appearance they are facts as to mind or will, and so, whatever the physical basis of mind may be, we may say with Aristotle—"Virtue is habit." We train ourselves, we train the young, we deal with criminals or savages, so that when a special occasion arises we or they may act at once in a manner of which we approve.[1] We endeavour to supplant rude and lower instincts by introducing social and

[1] Bacon's *Essays*, No. 39; Montesquieu, *Esprit des lois*, xix. 14.

higher instincts. We do this physically by self-mortification, or by discipline and punishment in other persons, so that, even assuming the basis of habit to be purely physical, the substituted habits involve an element of conscious reason.

SECT. IV.—THE TYRANNY OF FASHION.

We may regard habit as primarily unconscious in the subject of it, but in many cases it ceases to be instinctive and automatic. The tyranny of custom among children and savages is often remarked. These will perform an act in a certain way, and refuse to alter their mode of action because it has been their custom or the custom of their fathers, or the custom of their neighbours so to do. If the ploughing, or the fishing, or the weaving known for generations has produced fairly satisfactory results, why change it? If a change were made and failure were to result it would be a natural punishment. And this applies not only to what we regard as secular employments, but also to religious observances. In many cases their performance does no harm, their omission might result in unutterable evil. Nor is it confined to persons regulating their own conduct. The neighbours of the individual savage will not allow him to innovate, for in some matters, social and religious, innovation might imperil the existence of the community. And so here there is a double force of custom. It attracts the individual to regulate his conduct and his particular acts in a special way, and it at the same time presses him from the outside in the same direction. The worshipper of strange gods, the inventor of a new loom, or the author of a new form of metrical or musical composition, is sure to find himself face to face with an angry mob, which is composed of individuals who feel themselves personally and individually wronged. Each individual feels that the innovation is an infringement of his rights. It is a small step from the rights of the individuals to the right of the society, if the

individuals are sufficiently numerous or powerful to influence the conduct and opinions of the whole body.

But these feelings and ideas are not confined to savages or children. In what we call civilisation we find capricious fashion and etiquette as supreme and as tyrannical. Individuals may cling to the fashions of their youth—high collars, frilled shirts—and derive a satisfaction from the fact that they and their fashions grow old together. This is an individual custom, but it is the simultaneous change of fashion, in obedience to a general impulse—custom spread over an area—which here strikes the observer. Why do we wear tall, narrow hats to-day, and next year absolutely refuse to be seen on the street with anything but a low, curled one? We would feel that everybody in the street was staring at us, and our friends who met us, still schoolboys in spirit, would make jests at our appearance. Here is the working of conscience—a consciousness of doing something strange—*plus* a social sanction. A man of strong character will defy this phase of public opinion, and feel justified in defying fashion. And women, who are more susceptible to feeling, are more deeply affected than men by this phase of custom and fashion, and by the sanctions referred to. A middle-aged lady will hold out for a long time against a new and absurd fashion, and at last give way to social prejudice, merely that she may pass unobserved in the crowd. We see here successive custom in the individual coming into collision with simultaneous custom in the society.

SECT. V.—PARALLEL IN ART.

We have spoken of ornament in law, and the feeling of beauty. This is also connected with custom, which appears in the æsthetic forms of rhythm and symmetry.[1] Ornament is symmetry—regular marks or strokes on weapons or garments—a law of ornament. Dancing, music, poetry, are all

[1] *Cf.* Plato's identification of the good and the beautiful, in *Republic*, iii. 401.—(Jowett, iii. 276.)

varieties of rhythm, pleasing to the performer, spectator, or hearer. The regular beat of the step in the dance or march corresponds to the rhythm, which is perhaps more rapid, of the drum, or the rhythm still more rapid which becomes a sound—subconscious rhythm. So music evokes rhythmical stamping with a vulgar audience, or a slightly higher form of appreciative vulgarity displayed in humming a "pedal bass" along with the performance. But at the bottom of the highest musical satisfaction there is a nervous response to rhythm, or contrasts of rhythm.

In all forms of art what pleases people is the thing that they are accustomed to. People will listen to the same tune over and over again, read the same book, or admire the same picture, and the best way of catching the modern market is to produce the old article in a slightly altered form, so that the love of the old and the love of the new may actually co-exist without apparent conflict, but for this purpose there must not be much of the new.

A background of custom may lead men to appreciate change, which they may regard as improvement. Custom may become a wearisome burden, and any change will be welcomed. And thus a legal fiction, obeying the custom, and at the same time evading it, may be regarded as truly a divine inspiration. There are sure to be rebellious spirits in a community who wish for change, and wish to be different from the rabble. They may be suppressed or expelled, or, on the other hand, they may be admired and envied, and may thus set fashions. Every world has its rulers—the world of religion, law, politics, or fashion. The justification of all rebellion is success.

SECT. VI.—COMMERCIAL CUSTOMS.

In ordinary matters of commerce custom gives rise to implied contracts or implied terms of contracts. So it is the law that the custom of trade is an implied term of every

mercantile contract. In some lines of business it is the custom to deliver goods for certain work to be done thereon, and to allow the accounts therefor to be settled periodically, the workman having a claim to retain for his account any goods which happen to be in his hands. The parties have been dealing on this basis; the whole trade do so, because it is convenient; some would say it was "natural." The law recognises the custom and calls it "a general lien." There are such customs recognised in the Bills of Exchange Act—times for presentation—hours of business—hours of posting notices —usances, which are merely special customs. Customs are recognised in the Partnership Act, and are referred to in the Agricultural Holdings and the Crofters Acts; parties regulate their conduct by such customs, and cannot as a rule be made liable for following custom; they may as a rule be made liable for unnecessarily or arbitrarily departing from custom. The law is "follow custom." "The person who infringes custom will do so at his peril." When you employ a tradesman, you expect him to do the work in the usual manner, take the usual time, and charge the usual price. If he fail in any of these respects, you feel wronged, and a claim against him—a right—emerges. When you make a charter-party, you may not know the custom of the ports which the ship may visit, but you are satisfied if you are dealt with according to the custom of the port, for you are satisfied that it will be convenient, or at all events you are treated in the same way as others, and no favour is shown to any one. You may indeed make the implied contract express by stipulating for such treatment. You claim the observance of custom as your right.

And so customs, either confined to a district, such as a parish or county, or a harbour, or to a class of persons exercising a trade, as the stock exchange, regulate on the one hand the conduct of persons, and determine what they have a right to do, or what the other party has a right to expect. When custom has been violated, if damage has ensued, it raises a feeling of wrong in the party injured. He connects his

injury with the departure from custom, and claims reparation and a right to indemnity.

The law merchant[1] is the best known example of this. It is practically a body of customs and customary law obtaining between mercantile men, and its nature is illustrated by bills of exchange. Nor is this confined to law. Mercantile men follow fashions in correspondence; and in some quarters a book of mercantile correspondence may come to be regarded as binding with a force comparable to that of a volume of Conveyancing styles or Company precedents. The customary forms are adopted because they are valid and efficacious for some proposed end. A mercantile tribunal has no difficulty in explaining the meaning usually attached to the documents.

Language is merely a phase of this custom. In using it a contracting party follows the usual speech of the country, modified it may be by his own special habits. The other party is entitled to rely on his words having their usual meaning; but this is not determined by the understanding of the person addressed, but by that of any reasonable person. Even language is not a process between only two individuals.

One of the most striking examples of the effect of custom in prescribing forms is the policy of marine insurance. Every writer and every court condemn the phraseology as stupid, antiquated, ambiguous, unintelligible; but the law of insurance has been worked out by the courts in decided cases, and common law decides the rights of parties, while the timid insurance broker follows the sacred formula of the policy with the conditions and memoranda, because he is following fashion, and in so doing he is safe. If he strikes out a new path he may go wrong, he may incur ridicule among his fellows, and be liable in damages to his constituents.

This again illustrates the double effect of a custom. The average insurance broker is not tempted to depart from the usual form. He gets a print, and fills up the blanks: why

[1] Bell, *Comm.*, Pref. p. xi.

should he run unnecessary risks? The client would prefer this form. If it were altered, the client would undoubtedly blame the broker for any loss. His fellows in trade would laugh at his attempts to set himself up as a reformer, better than his contemporaries and predecessors. They would laugh louder when he fell into trouble. Whereas, if he were sued on the common form, he would have the unanimous sympathy of the whole trade; his interest would be their interest, and they would do all in their power to defend him: on the contrary, if he made a new precedent for himself, they would sympathise with his assailant, and give their conceited brother enmity and opposition. And then, to reinforce all this, we have the law courts, bound strictly by precedent, naturally and consciously, internally and externally, prepared to enforce the custom of trade, and the traditional and well-known form of policy, with its well understood results.

But in commerce custom is not the final judge of right or even of expediency. The courts demand that customs shall be lawful and reasonable. Sometimes the persons affected rebel against custom, but find it impossible to change it. In practice what is required is a statute with a force irresistible to overcome the inertia of custom. If this set up a statutory form, the courts will recognise it, and our difficulties disappear. The fashion is changed by imperial decree.

The difficulties of legislation in this country are now so great, and are still more so if several legislatures of different countries are to be consulted, that attempts have recently been made to draw up rules as to general average, insurance, and other matters by private congresses of lawyers and mercantile men.[1] It is to be hoped that the views of the International Law Congress expressed in the Glasgow Rules of 1901 will afford sufficient force to originate a new body of customs on the subject of marine insurance (p. 310, *supra*).

[1] In *Kendrick* v. *Burnett*, 1897, 25 R. 82, the Scottish Court expressly followed one of the Antwerp Rules, 1885.

SECT. VII.—FAMILY CUSTOM IN INDIA.

In India there is no *lex loci*, at least so far as regards the Hindu law, and persons are governed by the law of their personal status. This results in a different application of custom from that prevailing in Europe. Here custom is local,[1] but there a family may acquire a special custom of succession and carry this with itself to another province, where we should say it acquired a domicilé. So it has been settled that—

> "A particular family [can] have a usage differing from the law of the surrounding district applicable to similar persons. There is nothing to prevent proof of such a family usage. But in the case of a single family, and especially a family of no great importance, there will, of course, be very great difficulty in proving that the usage possesses the antiquity and continuousness, and arises from the sense of legal necessity as distinguished from conventional arrangement, that is required to make out a binding usage. Where the family is a very great one, whose records are capable of being verified for a number of generations, the difficulty disappears."—(Mayne, *Hindu Law and Usage*, 4th ed. 45-50.)

We must consider again the proposition that customs immoral or contrary to public policy will not be enforced. When English judges are applying this rule in the case of Indian litigants, the question they have to consider is what morality is to be the criterion—English or Indian?

It will be noticed that, whether in agricultural India or in mercantile England, the effect of custom is the same. The feeling is the same; the application depends on the physical and social surroundings.

SECT. VIII.—CUSTOM IN ECONOMICS.

The influence of custom in fixing wages is well known. A master will go on paying higher or lower wages because he has always done so. A workman will accept low wages or expect high wages because he has been accustomed to them. A strike is an emphatic protest against change, though even here workmen or masters may criticise their customs, demand a change, and try to enforce it by a strike.

[1] As to personal customs in England, see p. 340, *infra*, note 3.

A fair rent or price means usually the market rent or market price; but recent events show that even here custom is an insufficient and unsatisfactory standard. Hence the interference of the legislature by establishing the Irish Land Courts and the Crofters Commission—so as to determine fairness judicially. This idea is as old at least as Aristotle, who discusses economic questions, particularly price, under the head of corrective justice in a section of the fifth book of the Ethics. This discussion is the germ of a similar one in Pufendorf, *de Jure Naturæ et Gentium*, and is the reason why the Professor of Ethics in Glasgow taught economics, and Adam Smith came to study the subject.

SECT. IX.—COURSE OF DEALING IN TRADE.

But custom further operates as between individuals. There may be a course of dealing which the law prevents a person from suddenly abandoning to the injury or disadvantage of the other contracting party without due notice. A person may hold himself out as a partner in a firm, but he cannot plead against any persons who knew him in that capacity that he really is not. He has led them to believe that he is a partner, and they are entitled to go on treating him as a partner until he pays the debts incurred prior to notice. The custom may be regarded here as either that of the debtor or that of the creditor. A striking example of the nature of the right so raised is given in the case of *Ritchie* v. *The Clydesdale Bank, Limited*, 1886, 13 R. 866, where a person sued a bank for dishonouring his cheques when his account was overdrawn. He in effect pleaded custom; they had done it before; he expected them to do it again; they had failed; he felt injured, and claimed damages. But the Court decided that he had no valid ground for his expectation. Between bankers and their customers express contract rules, and if the complaisance or laxness of the bank had accommodated him before, it was mere foolishness to expect it to con-

tinue. This case shows that custom is subject to interpretation and regulation by the law; or that it is only one element in determining and resolving the conflicts between the rights of individuals.

Custom creates apparent rights simply because it is custom. It also creates duties; and finally it makes laws which solve the conflicts between these. But as law criticises and judges of customs, so the legislator tries to find a higher principle which will enable him to judge of the customs called laws.

SECT. X.—PRECEDENTS—PRACTICE.[1]

Precedents of courts are sometimes spoken of as a particular form of custom. The judge is bound by them as he is bound by fashion. He went carefully into the question yesterday, and there is no need of discussing it further to-day. Thus to individual judges their own judgments, if carefully considered, or even from personal vanity, become binding for ever afterwards. So in the older law of Scotland, "a long tract of decisions" of the Supreme Court proved the common law. Courts of co-ordinate jurisdiction set a fashion. From deference to great authority, from laziness, or expediency, other judges follow; custom becomes law. The judgment of a superior court must also be binding on an inferior judge, for a differing judgment by him would merely put the parties to the trouble of appealing; and the judges in the appeal court might pass remarks on his ignorance, stupidity, or obstinacy. Thus, apart from legal theory, precedents become binding. In Scotland the courts have now adopted the English rule, whereby one well-considered judgment may become a precedent.[2] But in this use of precedent the

[1] Salmond's *Jurisprudence*, Chaps. vii. and viii., gives an instructive outline of the history of Custom, Precedent, &c.

[2] As to the English practice reference may be made to the admirable exposition of Sir Frederick Pollock in his *Jurisprudence* (Chap. vi.), and examples of how House of Lords cases are treated in Scotland will be found in *Virtue* v. *Commrs. of Police of Alloa*, 1873, 1 R. 285; and *Primrose* v. *Waterston*, 1902, 4 F. 783.

courts have entirely abandoned the idea of custom. It is reason which is the basis of the decision, as it is of statutes. The supreme courts deliberately look to the future as well as to the special case before them. If they are not setting up a new custom they are at least making it definite. This is why the principle of *res judicata*, which properly applies only to individual disputes (Bankton, iii. 107) has been extended to the decision of a general principle of law by the courts. The case of *Clarke* v. *The Carfin Coal Co.* (p. 52, *supra*) illustrates the procedure of the courts. The House of Lords laid much stress on the point that such actions were unknown in the Scottish courts—*i.e.*, they appealed to the custom of the Scottish people and Scottish lawyers ; but *Clarke's* case was a precedent —the leading authority, which finally settled the law, unless the legislature shall interfere.—(*Cf. M'William* v. *Adams*, 1852, 1 Macq. p. 136.) Moreover, parties litigating look to precedent. If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment to-day if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights. In other words, a prior decision raises expectation, which creates a claim, which in turn ultimately founds a right.

But custom, as precedent, appears really to be a form of solving collisions of rights. Between two competing claims, both *prima facie* just, the judge appeals to "usus, quem penes arbitrium est et norma." If the parties indeed had been sure of the custom, they might not have troubled the judge. The dispute was rather one of historical fact than of pure law. The law is, "follow custom." This is natural and instinctive, and so the laws deduced from this rule are also sometimes called "natural laws." And, if we ever speak of the single precedent as a custom, it is on the same principle

as some older writers speak of statutes as custom. Both statute and precedent may be the starting-point of a new custom.

So strong is the effect of custom in law, we have actually gone so far as to say *Communis error facit jus.* For this purpose the error must be indifferent. It must be in a case where an arbitrary rule is more important than a theoretically fair one, and to disregard the rule would cause more injustice than the following of it would entail. The person bound may be so bound on the principle of bar from negligence or implied contract.

Another result of custom may be referred to which can be traced in the Law Reports. In small points of practice, and even in important points of substantive law, a conflicting series of decisions has sometimes been given in courts of co-ordinate jurisdiction. Each court has followed its own precedents—its own custom—not so much perhaps from the fact of the existence of the decisions as from the natural bias of the judicial mind, to which a certain line of argument or a particular decision appeals. Many of these differences have been removed by a reference to a superior court, but it is unfortunate that any difference even in trifling details of practice should exist. The forms in the Common Law courts, in Chancery, and in Admiralty in England illustrate the point. "'Practice,' in the modern usage of the legal profession, signifies a particular kind of custom, namely, that by which a court of justice regulates the course of its own proceedings." —(Pollock, *Jurisprudence*, p. 12.)

Precedent is primarily applied to styles or forms, as when we speak of *precedents of conveyancing.* But it is also applied to rules of substantive law—cases. We may apply to precedents the explanation of Paul as to the meaning of a rule (p. 306, *supra*). The law is not taken from the precedent, but the precedent is derived from the principle of the law. As in teaching or remembering grammatical rules, it is easier to carry examples in the mind, so actual cases

precedent, with their decisions, making legal precedents, bring the law more vividly before the mind, but they are not the law itself; or to take a concrete example, the illustrations of the enactments in the Indian Codes enable us to understand and remember the law, but they are not the law.

The importance of precedent in English law practice and procedure is shown in the definition of law proposed by Professor Salmond in his recent work on *Jurisprudence* (p. 11). He defines it as "the body of principles recognised and applied by the State in the administration of justice, or, more shortly, the law consists of the rules recognised and acted on in courts of justice." It is satisfactory to find in an English book that the Austinian superstition is giving way to historical criticism. But the learned Professor's proposed definition is also open to criticism. There was undoubtedly law—dooms, judgments, and precedents—before legislation was dreamt of, but there were also claims, pretensions, and conflicts, prior at least in thought and fact to the establishment of law courts. It is far from a scientific answer to the question, What is law? to say that law is what judges administer in law courts or what you find in law books. What we wish to know is why certain subjects are dealt with in particular institutions called law courts, and why law books are written, *i.e.*, first, what is justice? and then, secondly, what principle underlies the distribution of various material interests among various jurisdictions?

Law is a body of rules and principles invented, accepted, or adopted by men for the securing of order in human relations. The relations of men and beasts are not jural, because the servient animal does not find an end of its own in the relation. A slave may be all but a beast, or a man whom liberation would still leave bound to his former master by ties of gratitude. Men naturally divide themselves into leaders and followers, and the stability of a group or a state depends on the discipline of the members. So striking is the reciprocity between rulers and ruled, between judge and

litigant, that it sometimes appears as if rulers obeyed their subjects; and judges, as in the case of the unjust judge, obeyed the litigants. The rules of law are adopted and accepted by men as resolving their conflicts of rights and duties. The external test of justice is order, and the internal is contentment and satisfaction. Discontent and dissatisfaction give rise to claims which men soon call rights. If men invent a new game, they make new words, but they find the roots and the grammar in the common tongue of the country. They make new laws and rules for new relations, but they are all derived from the old laws and principles, consent, personal bar, interpretation, &c. This is one element of law—the principles, ethical, historical, grammatical and other, which enter into the idea of justice. And then on grounds of expediency men have consciously or unconsciously distributed their interests among various courts, civil and criminal, probate, matrimonial, military, ecclesiastical, commercial, superior and inferior, arbiters, committees of clubs, and so forth. It is now the fashion to communicate the law on all these subjects by means of reports of precedents. There is hardly an English tribunal which has not now a set of Reports. Even Cavendish on whist gives statutes and precedents, with rules of etiquette which lie beyond the sphere of "whist law." Courts of justice, specially so-called, deal with person and property, or what can be resolved into rights of person and property. As we are a commercial people we allow men to put a pecuniary value on their outraged feelings, and women to do the same for their wounded affections, and to sue in the civil courts. Continental critics [1] think that the duel or a horsewhip is more appropriate, but that would with us merely bring the case within the jurisdiction of the criminal or the police courts.

But the law is above precedent. As Sir William Harcourt [2] observed in the House of Commons on 4th

[1] *Cf.* Croabbon, *Point d'honneur*, p. 399.

[2] *Times*, 5th Nov. 1902, p. 6.

November 1902, when it was proposed to go back 150 years for a precedent—

"I do not say that we have not as much right to make precedents as our predecessors, . . . but it is very useful and very necessary that the House of Commons should have respect for the practice which it has followed for generations and even for centuries."

This gives one reason why we follow precedent. It is the same principle as we saw applied to rules of evidence (p. 231, *supra*). If you wish to go to a certain place you may take a short cut across a moor, but the man who keeps to the beaten track, though much longer, arrives long before you. It is a waste of time to discuss means every time you wish to accomplish some end, because after all there are objections to any mode adopted, and they all come to the same result. Then for the bulk of mankind who are ignorant, and for persons whose experience is limited or judgment immature, to follow precedent is the safest and wisest course. Thus, to a student learning a language his grammar book and dictionary are final authorities, as we saw the pharmacopœia was to the apothecary's apprentice. But the philologist or scientist will criticise the precedents, and perhaps deliberately set up new ones. Diodorus Siculus tells us that even this was not permitted in Ancient Egypt:—

"The physicians," he says, "have a public stipend, and make use of receipts prescribed by the law, made up by the ancient physicians, and if they cannot cure the patient by them they are never blamed; but if they use other medicines, they are to suffer death, inasmuch as the law maker appointed such receipts for cure as were approved by the most learned doctors, such as by long experience had been found effectual."—(I. 6, Booth's Trans., p. 43.)

Even at the present day public opinion is hostile to the use of hospitals as experimental laboratories; few medical men have the courage to try experiments, and still fewer patients the courage to submit. The true medical scientist experiments on himself, and in the meantime treats his patients in accordance with the custom of the profession.

Precedents, therefore, are an external form of laws; they

are part of the *data* of Jurisprudence, but they do not explain law, for (1) they spring from the administration of law, and the respect of men therefor; and (2) they may be criticised and set aside. This takes place even in inferior courts, such as the small debt courts in Scotland, and in arbitrations and jury trials, where the judge, arbiter, or jury within the limits allowed by law exercises a wider equity than he would do if his judgment had to be supported by written and published reasons, and were subject to review by a higher court. It is a subject of legal jest to direct a judge to dispose of a case "sitting as a jury."[1]

SECT. XI.—*MORA*—PRESCRIPTION,[2] ETC.

There are other legal institutions which may profitably be regarded from the point of view of custom. The doctrines of *mora* and prescription appear thus to be custom on the part of the person against whom the plea is taken, setting up a customary mode of thinking or acting on the part of his adversary. The person stating the plea has been so long accustomed to regard himself as free that the law declares him to be free indeed.[3]

A right of way may be regarded as a custom—a customary use on the part of the persons using the road—a customary grant on the part of the owner of the ground.

When a question arises as to river pollution, as between so-called primary and so-called secondary uses, it is resolved by an appeal to the custom of the district.—(Bell, *Prin.* 1106.) Prescription and the rule as to trifles both apply, but when public interests intervene the legislature may find that the past custom is bad and must be changed.

The interpretation of a will may depend on the usage

[1] *Times*, 25th Nov. 1902, p. 7.

[2] The etymology of this word affords an example of the transference of a legal idea from a form to the substantive right expressed thereby (*cf.* Muirhead, *Gaius*, p. 571, and pp. 32, 303, *supra*)

[3] See Comyn's *Digest*, *s.v.* Prescription; Encyclopedia of Laws of England, *s.v.* Custom; Salmond, *Jurisprudence*, 155.

and custom of a testator.—(J. Voet, *Ad Pandectas*, 34, 5, 4.) A deed signed with initials will be valid if it was the custom of the granter so to sign.—(*Speirs*, 1879, 6 R. 1359.)

SECT. XII.—THE DIVINE RIGHT OF KINGS.

What is the divine right of kings but custom? The son has grown into a line of habits; he has come to regard his family and himself as rulers, just as the son of a lawyer, or a soldier, or a draper thinks it *natural* that he should follow his father's profession. He is partly trained for it, and his training is almost always infinitely better and more thorough than that of a new man—an upstart, unless such an one has genius bordering on the divine. The subjects of the king have the same ideas—habits of obedience and subjection. They look as naturally to a hereditary king as they do to a hereditary farmer or baker or butcher. It is natural and expedient, for it facilitates the adjustment of function between the individuals. It may be pardonable in a British subject to suggest that the operation of this hereditary idea, a physical counterpart so to speak of the rule of law, to which we shall refer presently, is one of the grounds of stability of the British Constitution. The political machine works more smoothly than it does in America with the periodical turmoil of a presidential election.—(*Cf.* Seeley's *Political Science*, p. 221.) We also elect our kings, but we are unconsciously so biassed by the hereditary principle that the area of election becomes extremely small. In the age of faith this natural doctrine assumed a theological form. The king's title was a grant from God himself, for God not only enacted laws and revealed them, but gave titles (implied charters) to rulers. The answer to this was the "Rights of Man," which were also divine, and agreeable to reason. At all events the "Rights of Man" was the criticism of the divine right of kings.—(Seeley, *op. cit.* 178.)

Roman history affords an example of perverted application

of custom in the murder of emperors, the right of election claimed by the Prætorian guards, and the largesses paid to them by the persons elected. Some of the parties immediately interested no doubt spoke of these payments as rights and obligations.

But all rights are hedged with a sort of divinity. The Ulster tenant, the Scottish crofter, both claim rights, if not divine or natural, yet arising from possession and customs of long standing. Old servants never contemplate change. The housekeeper who is dismissed because her master is going to marry regards the new wife as an usurper who is infringing her vested rights. The reluctance to change makes men endure tyranny not only of rulers but of old servants; custom makes them all tolerable.

SECT. XIII.—THE RULE OF LAW.

The spirit of legality which pervades the United Kingdom has been remarked by many Continental writers, and has been learnedly and philosophically expounded by Professor Dicey in his *Law of the Constitution*, in the division on "The Rule of Law." This, too, may be regarded as custom showing itself in the action of the people and their rulers.

But the force of habit in the obedience to law and in its enforcement may be illustrated by everyday experience. There is a parish minister in Scotland who owes his election to the single vote of a girl whose name was allowed to remain on the roll by mistake, and whose vote was actually given after the votes of the congregation had been properly taken and had resulted in a tie. Those who accepted the vote expected it to be given the other way and felt themselves barred from objecting. To the congregation a vote was a vote, and a majority of one was a majority. The church courts asked no questions, and so a majority of one was accepted as if it had been an unanimous call. Acquiescence for the moment was the beginning of custom with the parties

interested. When the critical moment passed legal custom began to act with a continually increasing force.

Among some peoples and in some ages we may find priests and nobles, accustomed to command, ruling men who are naturally slaves, accustomed to obey. Between individuals at the present day we may find some influencing and controlling others, and these so subordinated that personal will is all but lost—a sort of moral hypnotism. But where there is freedom of discussion, and a capacity for taking advantage of it, then the rule of law must prevail. It is habitual deference to an idea instead of to a person or a class of persons. Sometimes we find attempts made to utilise this tendency for private ends. Sometimes the law is violated in substance while it is observed in form. The judicial trials of Charles I. of England and of Louis XVI. of France were intended to meet legal scruples of form. As at various epochs the Church has captured the machinery of the State and used it for spiritual-temporal purposes, so have oligarchies appealed to the divine right of the fittest to rule; capitalists, engineering gigantic trusts and monopolies, brazenly appeal to the sacredness of property and contract; and trade-union socialists struggle to set up a new slavery in the name of personal freedom. Many who demand compulsory arbitration in trade disputes wish a biassed tribunal with the formal prestige of a court of justice. What makes these legal aberrations possible is the habit of rational legal obedience—the rule of law.[1]

It is now customary to respect and obey the law, provided it is known. A great part of modern international law relies on this habit. By calling certain acts rights or duties, and certain rules laws, statements secure deference, when perhaps force would provoke resistance.

[1] *Cf.* Reeves, *State Experiments*, ii. pp. 102, 107, 111, as to precedent, custom, and the rule of law in labour disputes; p. 282, *supra*.

SECT. XIV.—EARLY LEGISLATION—A COLLECTION OF CUSTOMS.

In the preamble of the laws of Edward the Confessor, drawn up by William the Conqueror (Thorpe, 190), the twelve commissioners swore—"Ut quod possent, recto tramite incedentes, legum suarum ac consuetudinum sancita edicerent, nil pretermittentes, nil addentes, nil prevaricando mutantes." There is no idea of change by legislation—the very reverse. And the laws of William (p. 201) commence—"Cez sunt les leis e les custumes que li reis Will grantad al pople de Engleterre apres le cunquest de la terre; iceles meimes que li reis Edward, suu cusin, tint devant lui." "Iste sunt leges et consuetudines" is the Latin version.

Magna Charta is an appeal to custom. It was a custom to renew it from time to time. The relief of heirs is "according to the old custom of the fees." Cities, boroughs, towns, are to have "all their liberties and free customs." The making of bridges, the defending of river banks, are to be regulated by custom. Innovations such as weirs are to be put down on the Thames and Medway and throughout England, except on the sea coasts.

At a still later date (fifteenth century) the Consulate of the Sea begins with the words—"These are the good constitutions and the good customs (*les bones costumes*) which regard matters of the sea."—(Twiss, *Black Book of Admiralty*, iii. 50.)

In this connection we may notice the tendency of lawyers to identify custom with formulated "written custom." This is parallel to the movement which made rights title-deeds and obligations *written* bonds. There is a latent ambiguity lurking in all legal discussions as to the relation of *Lex* and *Mos*. If *Lex* is an enactment by the people, and if you can at once prove a custom to exist, then you may say that the formulated and proved custom is an implied *Lex*—or, as Isidore of Seville calls it, *Lex non scripta*.[1] From this

[1] P. 291, *supra*. The phrase as quoted is similar to "a *steel* pen," "an *iron* mile*stone*."

point of view the formulation of customs is an imitation of legislation. But now-a-days the relation is reversed, and so Professor Holland points out "that it would be more correct to say that written law was an imitation of custom."[1] We find an ordinance by Charles VII. of France, dated 1454, directing all local customs to be reduced to writing, and forbidding advocates in pleading to propone any others "que ceux qui ainsi seront escrits" (*Les edicts et ordonnances des roys de France*, Lyons, 1571, L. iv. t. 30).

It then becomes usual to treat "coutume" as a body of law opposed to Roman law or statute, as in the phrase—"Coutume de Normandie," &c.[2] Coke (*Inst.*, 2nd part, i. 58) gives among the meanings of *consuetudo*, statute law. This is custom set up by Parliament.

We may also notice here the usage of "customs" as applied to the duties or tolls exacted on goods imported or exported.—(Stephen, *Comm.* ii. 556.) These are royal rights —part of the hereditary revenue of the Crown: they are also duties, burdens, and obligations on the subject. They are the actual prestations in money, and may also be rights in a subject (Coke Lit. 58*b*).

Before customs are judicially or legislatively recognised, they may be regarded as a kind of law, popularly enacted, as Julian argues in the text quoted in the note, which may be easily amended and easily repealed in the same way by contrary custom. The case of *Bruce* v. *Smith*, 1890, 17 R. 1000, is an example of refusal to recognise a custom. Here the proprietor of lands in Shetland claimed a share of the proceeds of a school of small whales which had been stranded and captured *ex adverso* of his lands. The authorities relied on, and others which might have been quoted, such as the great Icelandic Law Book, Grágás (sect. ix. tit. 70), seem to establish beyond doubt that the custom is valid in Scandinavian

[1] *Jur.* 55; *cf.* L. 32, D. *de Leg. &c.* (1, 3), and *Decr. Grat.*, P. i., Dist. i. capp. 4 et 5.

[2] Merlin, *Rép. de Jur.* s.v. "Coutume"; Montesquieu, *Esprit des lois*, xxviii. 12 and 45; Littré; and the collections of customs by Basnage and Bourdot.

law, which is understood to prevail in these islands; but the Court (Lord Lee dissenting) held that the custom was unjust and unreasonable, and refused the claim. It is to be regretted that the landowners interested did not carry the case further by appeal, for the arguments of Lord Lee were not met by those of the majority. Custom had certainly not repealed the law, assuming it once to have existed. And if it were now to be considered unjust and unreasonable, it should have been dealt with by the Legislature and not by the Courts, whose function it is *jus dicere* and not *jus dare*.

SECT. XV.—CUSTOM AS A STANDARD OF CONDUCT.

Custom may also be viewed as a standard of conduct. This is seen in the usage of the words "moral, morality" (Latin, *mos*; Greek, ἦθος; and German, *Sitte*). The innate natural conservatism of humanity, savage and civilised, resents innovation. The innovator is wrong and commits wrongs; the follower of custom is right, and is entitled to vindicate his rights. Between two competing courses of conduct, the customary one is the right. Virtue is the habit of the community as well as the habit of the individual. "Common sense" is the standard to which we appeal; but even this becomes shifting. It may at first be in point of fact the average sense of the community, but it frequently comes to be the sense of the individual speaker, judging from his own standpoint what all *reasonable* men should feel.

Having become conscious, men find conflicting customs. Some are better adapted to their end than others. Men criticise their customs and find some good and some bad. The community may then do for weaker members what strong members do for themselves—try to break with what they think bad habits, and create what they think good ones. They have some other criterion than mere custom, and for our purposes here it does not matter whether it is revelation, or admiration of a new civilisation or theory, or

utilitarian consideration of some supposed end. The fact remains that new habits and customs can be established until they become as natural as the former — a second nature.

The formulation, and still more the writing and publication of customs, necessarily alter their character. Third parties may criticise the form of expression, and indirectly the matter of the customs themselves. The attempt to formulate a custom may lead to a denial of its existence. And if the custom is not the conduct but the formula, the possibilities of the mechanism of legislation appear infinite.

SECT. XVI.—THE COMMON LAW.

"The common law," as this phrase is used in England and America, sums up all these aspects of custom. This phrase regards custom sometimes from one aspect, and sometimes from another.[1] Custom affects all the elements of right. It creates the expectation and consequent claim of the creditor or plaintiff; it creates the sense of obligation or responsibility of the debtor or respondent. The prisoner may be so accustomed to his chains and the slave so inured to servitude that they refuse the proffered gift of freedom. Custom affects the sympathetic view taken by third parties, either as regards the parties disputing, or the material interests of third parties, or the State. It affects the views of the courts and of the legislature. In the midst of all our legislative activity we might still truly say, "Leges Angliæ nolumus mutare." What strikes the observer most is the conservatism of the most radical and democratic parliaments. The common law may be regarded as a body of local customs, but the locality is the whole kingdom. When the Roman law is spoken of as the common law it is regarded as a *jus commune*—a law common to several independent states. According to Erskine (*Inst.* i. 1, 28) when

[1] Browne on *Custom*.

mention is made of the common law in Scots statutes "the Roman law is understood either by itself or in conjunction with the Canon law. When the expression is fuller, the common laws of the realm, our ancient usages are meant, whether derived from the Roman law, the feudal customs, or whatever other source." The common law is often spoken of as "the law of the land," a phrase which occurs in *Magna Charta*, and is explained by Coke.[1] These laws may be legal rules for the regulation of rights, springing either from fundamental facts of man's rational nature or from prejudices which have become so engrained as to make a second nature. The common law is said to be embodied in the decisions of the Law Courts, and these decisions involve (*first*) the fundamental laws, such as "follow custom," and (*secondly*) the particular customs which they hold to be proved and established. But the courts criticise customs. Their rule is "follow good customs," and "good" customs mean such as further the ends of the State. And so it is said in our law books customs must be reasonable and lawful. Reasonable sometimes means purely customary, but in speaking of customs as reasonable there is necessarily a reference to another and independent standard, ethical, political, religious, or utilitarian. And finally customs become subject to artificial treatment in legislation. An arbitrary ruler may try to make arbitrary exactions of taxation endurable by calling them "customs." The taxpayer is willing to pay "customs" if they are truly customary. This is now settled by legislation, and customs refer not to a preceding tract of time, but to equality of incidence. In modern usage the common law means often the general principles on which the Courts decide when there is no statute or precedent. Here again custom is supplanted by reason.

[1] 2nd Inst. 50. In an address published in 1887 on *The Law of the Land*, Mr. E. J. Phelps tried to identify this law with certain principles in the written Constitution of the United States. This is not Coke's view, which refers to legal forms, and not expressly to substantive rights.

Thus throughout all society and the State custom becomes the servant of justice. It is in one aspect the force that sanctions all law. The legislature, the judicatories, superior and inferior, the executive in all its branches, are ruled by rigid customs and precedents, while the subjects of the State —the individual atoms of which the State is composed— take their places and do their work as in a mighty army, drilled and disciplined. The "rule of law" is the binding force of the great modern societies. Men instinctively, and by force of second nature, have come to do right, to observe the rights of others, and to stand up for their own rights. The sanction is not in police and armies, but in the bosoms of the individual citizens. Over all there is a veneer of politeness and of good manners of similar origin, which help also to facilitate human intercourse. Both in the individual and in the State we may now say "virtue is habit." But in both the habits have been purified and refined in self-consciousness. "Virtue is knowledge"—knowledge of some end or aim of man and society. To the outsider the knowledge may appear hazy and inaccurate, but to the conscious subject it is his own, and for him it is the spring of all his actions.

SECT. XVII.—RELATION OF LAW AND CUSTOM.

What, then, is the relation of law and custom? They may be regarded as related in several ways. If we take law as general, custom is particular. The first law is "follow custom." All the legislation which we know, the code of Khammurabi, the Pentateuch, the Indian Codes, the Twelve Tables, the Qu'rân, all imply or refer to a body of customs long prior in date, which they recognise and do not attempt to alter, for they cannot. But they do not wish to alter custom; they often try to reinforce it, for early codes are conservative, and not radical attempts to amend the law. Codes attempt further to regulate custom

or conflicting customs, and ultimately try to amend them by setting up other customs on theories of divine inspiration, or fictions of customs earlier than those of which the legislator disapproves.]

In some stages of human history the tendency is to deify abstract ideas or to make them the result of a divine revelation. The present tendency is to make the concrete abstract. Thus we have an innumerable number of customs. We generalise these and speak of custom as an abstract whole. A lawyer may know that he should follow custom, just as he knows that he should enforce contracts, or abide by decisions. These are general maxims of law, to be filled up with a content. A man may be a good lawyer and yet not know any of the private Acts of Parliament obtained by railway and other companies, nor the terms of private contracts, wills, and settlements, which are laws for certain parties, nor local customs, nor customs of particular trades; but it is recognised that a lawyer must know some branch of customs in detail, or he is not a practical lawyer. Conveyancing, mercantile law, company law, patents, railway law, criminal law—each of these represents for some men the whole of law—a symmetrical group of customs and statutes, embodying the whole law, for each is a type of the whole. And in like manner laymen familiar with a particular branch of trade, or the minute details of certain human relations, will often solve legal questions correctly and satisfactorily, common sense supplying the forms of legal logic. It is such considerations which justify the reference of mercantile cases to juries, and the extensive employment of arbitration in mercantile and other contracts.

[Custom, as we have seen, gives rise to claims which we call rights, also to duties and obligations. These may come into conflict either *inter se*, between different localities or trades, or with other ethical ideals. Law then must interfere; it is a higher principle which strives to solve these collisions. It must classify and criticise customs, and determine if they are

moral (*i.e.*, good customs for a certain end) or reasonable (*i.e.*, not in conflict with other definite ends). The relation of the two ideas varies at different epochs of man's history. Early customs make law; they are natural facts and make natural laws, but consciousness and the inventive faculty deal with them as with all natural phenomena, and law then deals with customs as with ordinary historical facts, criticises them, approves or disapproves of them, and utilises them for its own ends and the ends of the State. And finally, the legal habit—the rule of law—makes men instinctively obey laws if they are clearly laid down.

CHAPTER VI.

THE AIM OF LAW.[1]

SECT. I.—THE PROBLEM.

WHEN we ask what is the aim of law, we do not merely seek to ascertain what is the end which rulers and statesmen have in view, when they set up law courts and legal institutions and draw up elaborate codes; we wish to know also what men meant when they claimed rights, or when they doubted if they were bound; what impelled men to inquire of God, through "inspired" rulers like Moses, and why the litigious shades resorted to the tribunal of Minos (p. 287, *supra*). There is some end in each claim of right, some reason for resisting it, and some purpose in adjudicating in the dispute. No doubt this aim or purpose, whether conscious or unconscious, is an idea present to the minds of the parties involved, and is thus an element of the physical basis of law in the sense already indicated (p. 5, *supra*). As we have seen the

[1] Reference may be made to Kant's *Metaphysic of Ethics* (Semple's trans. 3rd ed.), p. 197; Hegel's *Philosophy of Right* (trans. by S. W. Dyde); Fichte, *Science of Ethics*, and *Science of Rights* (English trans.); T. H. Green, *Lectures on Political Obligation*; Bluntschli, *Theory of the State* (English trans. 2nd ed.), p. 305; H. Sidgwick, *Elements of Politics*; Seeley, *Political Science*, p. 128; Lotze, *Microcosmos* (English trans. 4th ed.), ii. 495; Lorimer, *Institutes of Law*, book iv.; Von Ihering, *Geist des römischen Rechts*, book ii. sect. 60, Meulenaere's trans. vol. iv. p. 317, and particularly the same author's *Der Zweck im Recht*, of which the first volume has been translated into French by M. de Meulenaere, under the title of *L'Evolution du droit*, Paris, 1901; Boistel, *Philosophie du droit*, ii., Appendice, "Metaphysique"; Bosanquet, *The Philosophical Theory of the State*; M'Kechnie, *The State and the Individual*, chap. iii.; Sir J. F. Stephen, *Liberty, Equality, Fraternity*, 2nd ed.; Mill, *On Liberty*; William von Humboldt, *The Sphere and Duties of Government* (translated); Le Comte de Vareilles-Sommières, *Les principes fondamentaux du droit*, Paris, 1889; E. Picard, *Le droit pur*, Bruxelles, 1899; Alfred Fouillée, *L'idée moderne du droit* (4me ed.), Paris, 1897.

idea of right expanding from the petty claims of individuals into the wide political rights of jurisdiction and sovereignty, so the aim will change its character, as the State differs from the individual. The State is composed of individuals, and yet is more than the mere sum of the men composing it at any moment. Even if this proposition is denied, it cannot be questioned that men set before themselves ideals, which are intimately related to their preceding experiences and yet in some sense transcend them. These ideals are not merely peculiar to individuals, but in many cases have a social character. If men deceive themselves, and are misled by hallucinations of transcendental ideals, these are physical facts, which give rise to legal phenomena, and so demand scientific investigation.

One other point as to the teleology of law may be noted here. In all our previous discussion of legal relations we have in general dealt with proximate ends or aims of the subjects of rights and duties, or of legislators and judges, in the form of interests—person, property, freedom, authority, jurisdiction, &c.—but this chapter proposes to deal with more remote ideal aims. Each of the terms, which we shall examine here, seems to show that men have found their previous ideas to be superficial, and that their continual purpose was to dig more deeply into the reality of things and of social relations. The distinction of form and matter is a question of logic or metaphysic; but it constantly meets us in legal discussion, and will be referred to again. What we must note, however, is that the ordinary man regards justice, equity, natural rights, all as substantial material interests. They are the matter which took the form of claims, powers, obligations, and liabilities. The statesman and the lawyer may take the converse view, and regard them when put forward by individual subjects as forms taken by rights, obligations, and laws. We see it clearly in religion. To each devotee his own creed is *the* religion—orthodoxy; to the statesman and philosopher they

are in general forms assumed by the spiritual aspirations of men. And while the subject of rights and duties aims at justice and other ideals in concrete fact, translates his ideals into material interests, or transforms gross material interests into ideals, the legislator often aims at the same nominal ideals as perfection in formal rules. The formalism of the professional lawyer is proverbial, and not difficult to explain. —(Bryce, *Studies*, i. 340). His interest is different from that of the parties. It is either to settle the point in dispute somehow, or to treat the legal process as a work of art. But the reverence for form is as characteristic of the ancient legislator as of the judge or practitioner. The ordinary lawyer is helpless without his statutes and style-book—compilations of precedents. It was ever thus. The earliest reformers sought a revelation. The Romans of the infant Republic sent commissioners to Greece. The prætors copied the edicts of their predecessors, and perhaps saw in their minds' eye a transcendental Edict. The canonists and the English Chancellors borrowed from the Roman law. Some early English laws were borrowed wholesale from the Bible. Older Scots law is a mere copy of English, and, later, of French and Dutch models. The *Code Civil* has furnished a model to other legislating codifiers. And so the lawyer is apt, as the Roman jurists did, or pretended to do, to set up an organised formal system of law, to which his own positive rules should approximate. When he is sure of the revelation, or of the antiquity, or of the reasonableness of the law, he will tell the discontented claimant that he ought to be satisfied, and that he is doing wrong by demanding any other thing, as when the painter of a portrait resents criticism by the subject.

We have hitherto confined our attention as far as possible to the physical and material side of law. Rights, duties, and laws are physically embodied in persons, things, and acts.

Rights are associated with the warrior and hunter of men and beasts; and, later, with the shepherd, the agriculturist,

the manufacturer, and the trader. It is the *dominus*, the *paterfamilias*, the husband, the father, who have rights.—(*Cf.* p. 265, *supra*.)

Duties spring originally from the position of the slave, the serf, the servant, the wife, the child.

Laws take form in the third party, the ruler, the judge, the arbiter, the *bonus paterfamilias*, the jurist, the expert.

Things, slaves, beasts are the objects of all these relations —the centre of the interests with which they deal.

The phenomena in which persons are known are acts, while things are seen in events.

The problem presented to the judge and ruler, and finally to the social philosopher, is, how is regularity and order to be maintained in a world of living and struggling men? It might be done by destroying men and things—by making the world a wilderness, when there would be nothing to fight about or nobody to fight. The problem really is, how is order to be maintained consistently with life? Can every human being be a man and exercise to the utmost his bodily powers and intellectual faculties? Can every human being enjoy rights? How can men compromise? Must some give up all their humanity, that others—many or few—may enjoy the claims and rights of their human nature? Are there human beings, by nature slaves, who have only duties, or only such rights as enable them to perform duties? Or is it always necessary that one man at least should die for the people? This is the problem with which statesmen, jurists, and philosophers have dealt under the name of justice.

In our discussion of law we saw that the idea of the single concrete decree or statute ultimately culminated in the all-embracing law which was the foundation of particular laws. And so with order. It is not merely lifeless regular arrangement, but the symmetrical conscious regularity of life, that is heaven's first law.

And, conversely, if we start from the general idea of law or order, we must develop it into the most minute particulars,

for the idea can only exist in concrete realisation. In this chapter we shall therefore reverse the process of the preceeding ones, and shall find that when men start with abstract legal ideas they always become concrete in the objects and interests of practical life.

SECT. II.—JUSTICE.[1]

It has been said that jurisprudence has nothing to do with justice. This is not the view of the common sense man, which alone concerns us for the present. It is merely an unwarranted generalisation of the undoubted fact, pointed out by St. Augustine among others, that a judge must administer the law and not criticise it. These two attitudes towards law are well distinguished by Gratian in his *Decretum* (p. i. dist. 4, capp. 2 and 3), where, after stating the purpose of laws to be the restraint of wickedness through fear, and the protection of innocence, he cites Isidore as saying—

> "Erit autem lex honesta, *justa*, possibilis, secundum naturam, secundum consuetudinem patriæ, loco temporique conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem inconveniens contineat, nullo privato commodo, sed pro communi utilitate civium conscripta."

This implies the exclusion by the legislator of arbitrary enactments and some test for the criticism of laws which the legislator proposes to enact. But Gratian goes on to quote St. Augustine to the effect that criticism must stop when the law is once enacted. The judge administers positive law and does not criticise it:—

> "In istis temporalibus legibus, quamquam de his homines judicent, cum eas instituunt, tamen cum fuerint institutæ et firmatæ, non licebit judici de ipsis judicare, sed secundum ipsas."

[1] In addition to the authorities referred to, the following may be consulted:—Montesquieu, *Esprit des lois: Lettres Persanes:* Herbert Spencer, *Justice* (Part iv. of *Principles of Ethics; cf. Principles of Sociology*): Lorimer, *Institutes of Law:* Paulsen, *Ethik* (5th ed.), ii. 127: English translation of 4th edition, p. 599: H. Sidgwick, *Methods of Ethics*, bk. iii. chaps. 5 and 6: *Political Economy*, bk. iii. chaps. 6, 7, and 9: Mill, *Political Economy*, bk. v. chaps. 8-11: Adam Smith, *Lectures on Justice, &c.*, London, 1896: Hume's *Essays* (Green and Grose's ed.), ii. 179.

The point is one of general interest. As in theology a man may say "Credo, quia impossibile," so in law a judge may go the length of saying "Judico, quamvis unjustum." "No law can be unjust" (Hobbes, iii. 335).[1] The same spirit of exaggeration impels moralists to regard duties as binding in proportion to their disagreeableness; economists are said to have nothing to do with philanthropy, as the scientific moralist is not shocked by cannibalism, polygamy, or brigandage. Pure literature may embody impure doctrines, or perhaps reaches perfection in absolutely nonsense verses. It is the same question which is raised in logic as to whether it deals only with words or with thoughts. But the common sense man brushes all this aside. If he attains "justice," he is often careless as to the means. Nothing gives him more satisfaction than to criticise and expose the absurd contradictions of valid legal decisions and sentences. The hangman in general executes his warrant and thinks no more of the matter, but we have no difficulty in conceiving of a conscientious hangman who might resign or refuse to carry out the sentence and so compel the authorities to hang him as well as the culprit. Notwithstanding St. Augustine, judges on the bench have protested in our day against criminal laws and against the law of divorce, and judges who dislike capital punishment sometimes persuade juries to deal leniently with murderers. The point of interest for us, therefore, is not the unsoundness of the view that jurisprudence is not a science of justice, but rather how it came to be maintained. It appears to be another example of the lawyer's fallacy, in which "form" is exaggerated till "matter" disappears. At the same time the logical development of a body of laws as a positive coherent system of traditions and rules and their interpretation may be an ideal aim for the lawyer or judge. When law is fully developed, as it is in modern times, this may be so, and is not inconsistent with lawyers and judges having other ideals as citizens or as men.[2]

[1] P. 400, *infra*.

[2] Pollock's *Jurisprudence*, 30.

Law seems always to divide into two sections, one of which is absolutely or relatively unchangeable, and the other changeable and so far arbitrary. Thus we have—

1. Justice	contrasted with	Law.
2. Law of Nature	„	Positive law.[1]
3. Jurisprudence (in the French sense), interpretation, &c.	„	Statutes, *lois, ordres*, &c.
4. Constitution of State	„	Ordinary laws.
5. Standards of a Church	„	Ordinary ecclesiastical laws and matters of opinion.
6. Memorandum of Association of a Company	„	Articles of Association.
7. Charter of a Corporation	„	Bye-laws.
8. Privilege of Parliament	„	Order.

(See debate in House of Commons, 6th March 1901).

Behind the relatively unchangeable men seek for an absolutely unchangeable idea, which many find in the idea of justice in God, but this again touches metaphysics.

The etymology of the Latin word shows that the idea of justice, like that of law, begins with actions and law courts. All other usages are metaphorical, and are derived from this. If we can express a relation in the form of a claim by one side, a response by another, and a decision or reconciliation by a third, then the basis of the metaphor is complete. The universe can be presented under the figure of justice, as poets have treated "loves of the plants" or "loves of the triangles." The parallelogram of forces gives an example of physical justice where the diagonal embodies both of the forces in action. The motions of the planets resolve with perfect justice the centrifugal and centripetal forces. We see sub-human justice in the animal world. But in all these cases we have first analysed a single phenomenon into two contradictory ones, and then find difficulty in reconciling our own abstractions. This appears to be the fallacy which runs through Mr. Herbert Spencer's interesting

[1] *Inst.* i. 2, 11; Hobbes; iii. 264, p. 398, *infra;* Hooker, *Works*, i, 272.

and instructive volume on *Justice*. What he calls the egoistic sentiment of justice must be reconcilable with the altruistic sentiment of justice, or one or both of them are mistaken. The ordinary man, when he acts as judge in other men's affairs, regards justice as some "reasonable" concrete compromise, if not the ideal which comprehends and reconciles both of the contradictory sentiments. The egoistic sentiment of justice is what we generally call the right or claim of an individual.

But in human relations there is less difficulty in extending the idea of justice beyond the case of two persons litigating or putting forward competing claims. We speak of a duellist, a gambler, or a drunkard as being unjust to his family or his friends, or to himself. We have no difficulty in splitting the person into various selves, and saying that this orator or this student does not do justice to himself. The person has set up a reputation or a former standard of himself, and now when the spectator, or the person who has wagered on his success, or the person himself, acts in reliance on this reputation, he fails to satisfy the expectations he has set up. He may be judge himself, or any third party may act in that capacity. The standard may be set by society, *i.e.*, law or custom. If a duellist or a gambler is not unjust in some sense, then laws which attempt to discourage duelling or gambling may be denounced by the person interfered with as arbitrary and unjust, as depriving him of powers which he claims to exercise, and in which he finds satisfaction. If society regards betting as a harmless amusement, or duelling as necessary for the maintenance of honour, we may still have unjust players and unjust duellists (p. 275, *supra*), persons who violate the laws of the particular institution.[1] But society may, by way of precaution, forbid gambling, because it leads in some cases to moral ruin and suicide, and duelling because it may easily become veiled murder (*cf.* p. 254, *supra*).

[1] Report of Select Committee of House of Lords on Betting, 1902, p. 151, &c. See debate in same House, 18th May 1903.

It is precisely because such persons are unjust to themselves, their creditors and their friends, that the common sense of society interferes. Law in other cases is familiar with the idea of injustice to one's self. It is because they are unjust to themselves that Scots law, following the Roman law, interdicts prodigals.[1] So also, while it is true that "there is a part of just conduct which lies outside the sphere even of law, as it ought to be," as in the case of a father in regard to his children—(Sidgwick, *Methods of Ethics*, 6th ed. p. 265)—we see that the law not only does interfere with and regulate the *patria potestas* under the form of equity, but one of the most striking developments of recent law has been the Education Acts, Vaccination Acts, Factory Acts, and many others, which the persons aimed at often resent as encroachments on their just rights. Society had in view the just rights of the children and the State. The phenomena of justice are continuous, but as law is a rough remedy a wide equitable jurisdiction must be left to officials, and even in some cases to private individuals. And again, since law may do greater harm by the protraction of litigation than it would do by letting things alone—*summum jus summa injuria*—it is assumed that certain decisions are just. They are so in general, and the exceptions may be neglected. Examples of such cases are the restriction of appeals, the holding of decisions by arbiters, by juries, by judges of first instance, to be correct,[2] the privilege of masters and officials, the *patria potestas* over children, the power of testing; the final

[1] Bell, *Prin.* 2123-2128; Moyle's *Institutes*, p. 171; Muirhead, *Gaius*, 577. The same principle is adopted by the French and the German Codes,—*Cod. Civ.* Art. 513; *Bürgerliches Gesetzbuch*, 6 (2), 114, 2229.

[2] *Cf.* Small Debt Act, 1837, sect. 31, which provides, "Appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the court shall think took place wilfully, or have prevented substantial justice from having been done," &c. As to "corruption" of an arbiter, see Bell on *Arbitration*, 2nd ed. 34, and Irons and Melville on *Arbitration*, 377. This is largely formal but not entirely so. See opinion of Lord Neaves in *Cameron* v. *Menzies*, 1868, 6 M. p. 280. As to ecclesiastical jurisdiction *cf.* Dodd, *Canon Law*, pp. 221, 234 note; *The Queen* v. *Archbishop of York*, 1888, 20 Q.B.D. 740.

responsibility being placed on individuals subject to the force of public opinion on the merits, and to the review of the Court in serious matters of form, secures an approximation to ideal justice.

The application of the term justice to such cases implies that a relation has been established between two persons (real or supposed), and that there is a claim on the one side and a prestation on the other. Where the prestation (interest) is material, there is always a struggle to bring it within the scope of law and definite rule, because it is generally assumed that a material object may be measured or weighed. If the prestation is spiritual—good feelings, kind words, &c.—the relation is ethical. But breaches of morals and good manners may lead to material injury. Law deals even with these in such cases as libel and slander; but an unjust critique of a book, in the very best faith, a jest at the expense of a person, meant to be good-natured, may entail to him most serious damage; these cases are left to the jurisdiction of private judgment. The law courts would make blunders in attempting to do material justice; and so the law regards the private judgment of the individual as final, as it makes verdicts of juries, awards of arbiters, decisions of referees in games, judgments in ecclesiastical courts and judgments of sheriffs, all final within their proper jurisdiction. The State justice of the law courts (commonly so called) is a great fly-wheel or regulator, which keeps the rest of the social machine working regularly, but it does not supply the motive power. Law, strictly so called, emerges under two conditions—(1) the interests dealt with must be material, and (2) they must be capable of definition. If either of these two conditions fail, the question becomes one of ethics, or equity, but the analogies of justice still apply. So if a prelate with an income of £15,000 a year, which he is expected and intended to spend in certain ways, were to refuse charity, were to allow his palace to fall into disrepair, and hoard up as much as possible of his income,

people would soon speak of him "robbing" the poor and "cheating" his successor. The law treats him so far as an absolute proprietor, and leaves his discretion to be regulated by equity and morality, for rigid rules might defeat the purpose of the institution. He is a judge with a certain limited jurisdiction, and within the limits of this his judgment is final.

Again we may thus explain rules of constitutional practice, which are generally observed, but which no court of law can enforce. These Professor Dicey has termed "conventions of the constitution," as being "a body not of laws, but of constitutional or political ethics."—(*Law of the Constitution*, 6th ed., pp. 24, 361.) Now popular usage has no difficulty in speaking of such rules as laws, and in applying to the conduct regulated by them the terms "just" or "unjust." The common man regards the King, when summoning or dismissing ministers, as a court of final jurisdiction; and the Prime Minister and the Cabinet as a high court of equity, whose decisions are subject to appeal to the King, and in the last resort to the judgment of the sovereign people. A rigid rule would be disastrous, but the decision is momentous, and involves material interests. To regard these rules as rules of law and justice emphasises the view that their decisions cannot be purely arbitrary, and that the sanctions are not mere expressions of opinion or a reference to a future world, but may be material and imposed here and now, as in expulsion from office or from Parliament, or may take the form of attacks from the more respectable part of the press, whose support is necessary to political life. When a case of unconstitutional conduct or political jobbery occurs, the public express their opinion in legal terms, just as they speak of the injustice of a sentence on a criminal, although no court and no Home Secretary could find any ground for setting it aside. The wideness and the finality of the judge's discretion do not affect the question. Thus a judge may dismiss with an admonition a person convicted of culpable

homicide, or may sentence him to penal servitude for life. This would be legal, and technically there is no appeal. But his own common sense and good feeling, and the influence of public opinion, make sentences generally reasonable, just as the same forces tend to make the conduct of statesmen orderly, reasonable, and in fact legal.

In practice a Secretary of State often exercises an equitable jurisdiction really judicial, for example, in refusing or granting naturalization under the 1870 Act. Again, in extradition procedure we have the magistrate at Bow Street and the High Court dealing with the applications, and above them the Secretary of State, who may finally and in his discretion liberate the prisoner. But his conduct is not arbitrary. He recognises legal and equitable circumstances; but he dare not act from mere caprice for the reasons above stated.

Finally, we personify States, and speak of international justice; we personify Capital and Labour, and speak of their just shares of their joint product; we personify *the* Rich and *the* Poor, and speak of the claims and duties of each. —(Menger, *The Right to the whole produce of Labour* (trans.), London, 1899.) And in these cases also the adjustment of claims is left to governments, bodies of employers and workmen, or contracting parties—all analogous to courts with limited and well-defined jurisdictions, and guided by a law or equity of their own.—(*Cf.* p. 279, *supra.*)

Justice has a threefold aspect corresponding to right, obligation, and law. The pursuer or claimant demands justice and nothing else; the debtor pays or does justice and nothing more; the judge in adjusting their differences acts justly in his own person, but he recognises and enforces justice in the person of the litigants. This fact gives us a key to the understanding of the discussion of justice in the abstract by various writers; they are unconsciously analysing right or law. Looking at it from one standpoint, they identify justice sometimes with the subjective feeling of one person or another involved in the relation, or with the prestation—the object—

which ought to satisfy all claims of justice, or with the objective idea in society, organised in the State or its courts and officials. This explains the various attempts to distinguish and classify different kinds of justice. These are always directed to particular ends, as in Aristotle's familiar division—(1) Distributive, applying to the allotment of honours and burdens; (2) corrective, to restore a balance of right which has been disturbed; (3) commutative, applying to mercantile transactions, &c.

Early law and justice may be taken as identical, the former being an attempt to realise the latter, or the latter being an idealization of the former. As opposed to injustice the rudest remedy will appear perfect justice. But as the State grows powerful, and as the standard of obedience to the law rises, the standard of justice rises in proportion. Justice, like law, begins with actions, the decisions of actual concrete cases by the king or judge. It then becomes extrajudicial, for it must have been in the facts, in the conduct of the parties, before it was made explicit by the judge or ruler. We have seen (p. 34) that the judicial combat superseded a real combat, and also (p. 54) that the English suit was originally an actual pursuit. Judicial proceedings are originally intended to "do justice," to enforce undoubted rights, but when courts come to investigate competing claims, when it is seen that defenders have rights as well as pursuers, the judges analyse the claims and give a new meaning to justice, by recognising, creating, and classifying the multifarious rights now known to law; justice becomes specially "judicial justice." And when we reach historical times justice has again come to deal so much with extrajudicial conduct, as we have seen it does at the present day, that justice may fairly be used as it was by Aristotle and the Schoolmen, to cover the whole area of virtuous conduct—righteousness, the spirit which shows itself in just acts, and which is indistinguishable from the higher forms of religion.

SECT. III.—ROMAN *JUSTITIA*.

With the Romans justice represented the ideal abstract side of what once had been a concrete physical relation. "Justitia est constans et perpetua voluntas suum jus cuique tribuendi." As we have observed, it may be justice displayed by a claimant who would not claim anything not his own; it may be justice in a respondent who gladly gives up another's right when the wrong is pointed out; or it may be judicial justice, which judges between the parties and gives to each his own right.

Ulpian's definition of justice, which has just been quoted, was as old at least as Cicero, who in an eloquent passage (*De Fin.* v. 65) described the association of men as springing from marriage and the family, and spreading gradually to cognates, to relatives by affinity, to friends, to neighbours, to fellow-citizens, to state allies and friends, until it embraced the whole human race, and concluded thus—"which disposition of the mind, giving every one his own (*suum cuique tribuens*), and liberally and equitably guarding this partnership of human relation, as I call it, is called justice, to which are added piety, goodness, liberality, benignity, comity, and whatsoever else is of the same kind." We have a hint of the double nature of justice, the physical basis as well as the disposition of mind, in the statement (66) that "justice cannot be observed except by a strong man and a wise man."

Justitia in Cicero is a translation of the Greek *δικαιοσύνη*, which we shall examine presently, and comes into existence as an abstract noun. Its physical associations are earlier, and are found in the word *jus* (p. 33, *supra*). *Justitia* comes from *justus*, which we may take to be "full of" or "connected with" *jus*, as "honestus" comes from "honor," and "fastus" from "fas." *Justitia* is the abstract remedy given by the ruler when he administers *jus* in the concrete.

This would reverse the order of meanings given by Lewis

and Short (*s.v.*). In the Twelve Tables we find "XXX. *dies justi.*" This may mean "lawful" days; in some sense analogous to the "dies fasti" spoken of by Ovid:—

> "Ille nefastus erit, per quem tria verba silentur;
> *Fastus* erit per quem, lege licebit agi."
>
> (*Fasti*, i. 47.)

If *dies fastus* is a court-day, *dies justus* may be wider and mean a day on which any legal proceeding is competent.

Then such phrases as *justum matrimonium* (Ulpian, v. 2), *justa uxor*, *justus filius* (Gaius, i. 77), *justum bellum*, may refer to *merely* legal relations, with a tendency to shift into an ethical signification. It becomes purely ethical with Cicero, as when he speaks of a man "bonus et justus."

It has a metaphorical reference to things, and may mean either customary or adapted to some end or conforming to an idea, *e.g.*, the height of a wall, a day's march, an army (complete?), a trunk (full?),—(Lewis and Short, *s.v.*)

Lastly *justa* means due prestations, looked at sometimes as rights or privileges, and sometimes as duties or obligations, or it may be lawful ceremonies, *e.g.*, funeral rites.

Although *justitia* is the abstract idea corresponding to the concrete *jus*, it becomes concrete in the end itself: *justitia* is a goddess—the physical embodiment of right.

Justitiæ is used in the Latin Vulgate as equivalent to "judgments," "precepts," "ordinances." We may now go back to the Greek words of which *justitia* was a translation.

SECT. IV.—GREEK TERMS FOR "JUSTICE."

Δίκη is the first of these. The etymology of this word has already been discussed (pp. 36, 38, *supra*). Sir Alexander Grant (*Aristotle*, ii. 114) observes, "The earlier notion connected with δίκη seems not to have been one of decision, arbitration, or justice, but rather of 'showing,' 'instruction,' 'rule,' 'manner.' The word is derived from a root δικ-, which appears in δείκνυμι and the Latin *indico*, *index*, *judex* (the law-shower), &c." Meissner (*Altbabylon. Privatrecht*, 125) points

cut that the old Babylonian word for judging had the meaning of "instructing," "showing." According to this, *δίκη* would mean the direction given by the judge to the persons who came to inquire of him. It would soon mean a decision, and the other meanings of case, custom, and justice would follow. That is to say, "a decision" would mean a true, real, sound decision—good law, as "morals" means *good* morals. But as with Oriental nations, the ruler was the early judge (p. 59), so with the Greeks, the ordinary citizen took a share of judicial as of political duties, and accordingly they did not draw the same distinction between law and politics as the Romans. With the latter legal ideas were supreme, with the former law was merely a branch of politics. The Greeks discussed the state or the life of the individual as a unity—a work of art. The Romans were individualistic, discussed *cases*, and particular acts of particular individuals in particular relations. The first meaning of *δίκη* being judicial, the tendency to personify things and the powers which were supposed to rule them, applied the simile of a judge dealing with litigants to the spirits who actually kept the elements generally in order. The winds, waves, lightnings, and the sun were ruled *κατὰ δίκην*. And here, as in human society, no distinction was drawn between law and politics, as we may gather from Vergil's description of the empire of Æolus (*Æneid*, i. 52; p. 287, *supra*).

But the other explanation already given of the meaning of *δίκη* (p. 38) is closely connected with the foregoing. On its active side *δίκη* would often mean an incantation, when the wizard with outstretched fingers made the boundary stone sacred. There were also Prosperos, who could rule the elements, as well as the spirits who controlled them. Orpheus, the first of lyrists, had this power, but in his turn fell under the spell of love—the wide-enchantress—Eurydike, whose power was still greater. To the early Greeks such ideas were familiar, while the later technical legal associations would have been strange.

The word for justice used by Heraclitus is *δίκη*, and it has always a physical reference. Thus—"The sun will not exceed his measures; if he does, the Erinyes, the avenging handmaids of justice, will find him out" (Burnet, *Early Greek Philosophy*, p. 135; *cf.* pp. 51, 73, 147.)[1] So *ἀδικία*—a wrong—is applied to such events as a drought or a flood.

Homer applies it to the usual course of events; and the adverbial use *δίκην* is quite classical—*δίκην ὕδατος*—after the manner of water.

Then it comes to mean human customs and good customs, and then abstract right as opposed to *βία*—might.

And finally it becomes personified as a goddess in Hesiod:—

"ἡ δέ τε παρθένος ἐστὶ Δίκη Διὸς ἐκγεγαυῖα."
(*Works and Days*, 254.)

Homer applies the plural to righteous judgments. Perhaps this suggests the abstract idea.

The post-Homeric usage is legal, and now the word probably means a legal sentence. It means the process by which this is reached—any lawsuit, and particularly a private one; a trial of the case; the court by which it was tried; and the result—penalty, punishment. The reference here again is physical, like *ποινή* (p. 164).

We have already noticed (p. 45, *supra*) that when *δίκη* became technical the poets added the epithet "straight" to distinguish it as true justice. Similarly, Hesiod says:—

"Ζεὺς . . . . δίκῃ δ' ἴθυνε θέμιστας."
(*Works and Days*, 9.)

The same poet, in his pessimistic view of the society of his day, draws a distinction between the rude law of nature (*νόμος*) which was common to man and the beasts, and the higher justice, which was given to man alone:—

[1] In a similar reference the Septuagint uses *λόγος* (Psalms, 148, 8, *cf.* p. 387, *infra*). "The Law of Nature" is familiar in this sense (Hooker, *Works* (Keble's ed.) i. 206-208).

"καὶ νυ δίκης ἐπάκουε, βίης ὸ' ἐπιλήθευ πάμπαν.
τόνδε γὰρ ἀνθρώποισι νόμον διέταξε Κρονίων,
ἰχθύσι μὲν καὶ θηρσὶ καὶ οἰωνοῖς πετεηνοῖς,
ἔσθειν ἀλλήλους, ἐπεὶ οὐ δίκη ἐστὶν ἐν αὐτοῖς·
ἀνθρώποισι δ' ἔδωκε δίκην, ἣ πολλὸν ἄριστη
γίγνεται." (*Works and Days*, 273-278.)

Δίκη being physical and technical, δίκαιος (just) partook of the same meanings. Thus Solon called the calm sea δίκαιος—*i.e.* exhibiting δίκη. It therefore became necessary to invent a new word for the abstract virtue of the man who was δίκαιος. This was δικαιοσύνη, which is the familiar term used by Plato and his successors, τὸ δίκαιον being the principle of justice (Stewart's *Notes on the Nicomachean Ethics*, i. 374).

In the Laws[1] (Jowett, v. p. 194) we have a clear statement of the *bellum omnium contra omnes* put in the mouth of Cleinias, the Cretan:—

"In reality every city is in a natural state of wa · with every other, not, indeed, proclaimed by heralds, but everlasting."

"All men are the enemies of all other men, both in public and private, and every individual of himself."—(P. 195.)

Justice is the virtue which produces harmony in the individual soul as well as in the State, and makes order and society possible. The Greek order of ideas involves a comparison between external nature on the one hand and the soul of man and the State on the other. The regular order of Nature—the revolution of the seasons, seedtime and harvest—exemplifies δίκη. Earthquakes, storms, droughts, famines, plagues, are all examples of ἀδικία. The world generally—&c. is presented to us as Kosmos—regular order. Shakspere has well expressed these ideas of justice:—

"The heavens themselves, the planets and this centre,
Observe degree, priority, and place,
Insisture, course, proportion, season, form,
Office and custom, in all line of order:
. . . . . .

[1] Plato deals with justice in the *Cratylus* (Jowett, ii. 235) and in the *Republic*. The passage in the former is an echo of the theories of the old physicists. The discussion in the *Republic* reminds us of the theological distinction of faith and works (Jowett, iii. 198).

> Take but degree away, untune that string,
> And, hark, what discord follows ! each thing meets
> In mere oppugnancy : the bounded waters
> Should lift their bosoms higher than the shores,
> And make a sop of all this solid globe :
> Strength should be lord of imbecility,
> And the rude son should strike his father dead :
> Force should be right ; or, rather, right and wrong,
> Between whose endless jar justice resides,
> Should lose their names, and so should justice too."
>
> (*Troilus and Cressida*, i. 3, 85-88 : 109-118.)[1]

The soul of man is swayed by passions strong and turbulent. If these are restrained and kept in order the man is acting like the gods who keep the winds and other elements in check. He shows *δίκη*—justice in his soul. In the State turbulent men break the peace, like rivers rising over their banks. The restraining force which keeps them in order is justice. If this justice is not some impalpable essence—fire or heat—which keeps the streams melted and makes the green things grow, it shows itself in external orderly appearances. It seems as if the anthropomorphism of early Greek religion still clings to the philosophers, and appears even in Plato.

Plato in effect asks:—What is the rule of justice? External conduct? Paying debts? Giving every man his own? Obeying the laws? Custom? Fashion? Doing good to friends and evil to enemies? Can a man be a just citizen and a bad man? May you not have justice between citizens and enmity as regards strangers? On the other hand, does it not reside in the soul? May a man not be just by habit and sometimes slip? Is it not the *constans et perpetua voluntas*—apart from the accidental realisation?

In the Platonic idea of justice the philosopher contemplates the usual common order of things as the standard, the deviation from which is wrong. The physical world is generally regular and orderly; the social order is fairly satisfactory, though it might be improved in details; the soul of man is generally sound and right in its judgments.

[1] *Cf.* Note, p. 368, *supra*, and Max Müller, *Last Essays*, ii. 291.

In a word, life is worth living in ancient Greece. Justice is the ruling principle.

Aristotle in the *Ethics*, book V.—though it appears to be doubtful how far we have his own exposition of the subject, and some of the difficulties of interpretation are insuperable—discusses justice, but treats it as a virtue of the individual, and in one sense as comprehending all virtues :—

"Justice is a habit such that those who possess it are disposed to do just acts and act justly, and desire that which is just."

"Justice is a mean state, not in the same way as are other virtues, but in that it aims at producing that which is in the mean : whereas injustice aims at producing one or other of two extremes. Moreover, justice is a habit in virtue of which the just man is said to be disposed to do deliberately and of free purpose that which is just, and to make a distribution, whether between himself and another, or between two others, not such that he himself secures the larger share of advantage and his neighbour the less, and of disadvantage the exactly contrary : but rather such that he only secures for himself that which is his equal share, according to a fair proportion, and observes a similar rule in his decision as arbiter between two claimants. Injustice on the other hand aims at producing that which is unjust, and which consists in such an excess or defect, as the case may be, either of the advantages or of the disadvantages, as to violate these rules of proportion. And hence injustice is both an excess and a defect, in that it aims at producing both an excess and a defect—in one's own case that is to say an excess of that which is in the abstract advantageous, and a deficiency of that which is disadvantageous : while when the unjust man acts as arbiter between two claimants, the character of his act as a whole obeys the same rule, but the particular violation of proportion that takes place may be to the interest of either of the two parties to the suit. In fine, in an unjust act, to get less than one's share is to be wronged, and to get more than one's share is to commit a wrong." — Chapters i. v. and vi. (Williams' translation.)

In this and other passages Aristotle defines justice by reference to the external object which satisfies just claims. The just man is one who does just acts. Just acts are defined by reference to a standard of equality or proportion according to circumstances :—

"The mean between the two is that which is equal, or, as we call it, just. Hence that which is correctively just will aim at the mean be-

tween loss and gain. And so after a dispute men betake themselves to a juror or justice, and to betake one's self to a justice is to betake one's self to that which is just—a justice being abstract justice, embodied in a concrete person (*οἷον δίκαιον ἔμψυχον*), and thus they seek for a justice as an impersonification of the mean" (chap. iv.).

"Since the justice is the impersonification of the mean, that which is just will be in the mean (*μέσον ἄρα τι τὸ δίκαιον εἴπερ καὶ ὁ δικαστής*). And so, too, a justice produces equality in the same way, as if a line being divided into two unequal segments, one were to take the excess of the greater segment over and above the exact half of the line so divided, and were to cut it off from the greater segment and to add it to the less. For when the whole has been divided into two equal parts, and the parties have each received an equal share, then men say that they have that which is their own (*τότε φασὶν ἔχειν τὰ αὑτῶν*). That then which is equal after this wise is the arithmetical mean between that which is too much and that which is too little" (*ib.*).

In chapter V. of the same book we have an economic discussion of proportion and price. If a house is worth five pairs of shoes, and these are exchanged, then the parties again are equal:—

"When the result of the contract has been such that each party has got that which is fairly his, then they are equalised, and fairly represented in the contract, in that there can result between them the following relation of equality, A : B : : C : D, or A × D = B × C. in which A. being the husbandman, C. so much provision, and B. the cobbler, D. represents an amount of the produce of the cobbler equal in value to C. And unless reciprocation were to take place after this wise, there would be no transactions between man and man."—(*Ib.* p. 130.)

Besides this economic discussion he treats in some detail the classes of relations and the classes of acts in which justice and injustice are shown. This is to a certain extent technically legal. Particular justice is divided by Aristotle into two classes—dianemetic[1]—distributive—concerned with the distribution of honour or money, or of such things as are shared in common by the body politic; and diorthotic—corrective—which has its place in transactions and contracts, whether voluntary or involuntary. These two classes seem to correspond to the two functions which we saw were fulfilled by the ancient king who distributed land to his followers and de-

[1] As to the translation of these terms, see Burnet, *Aristotle's Ethics*, p. 213. Grant, ii. 108, notes.

cided their disputes as to boundaries (p. 42). The two classes were archaic in the days of Aristotle, and his exposition is an attempt to adapt them to the state of politics in his own day, when many more things than land had to be distributed and legal disputes were much more multifarious. Trendelenburg (*Hist. Beitr.* iii. 399) attempts to identify the two classes with public and private law. Lorimer (*Inst.* p. 409) takes exception to this identification, but it may be observed that the distinction of public and private law is not the same now as in ancient Athens.—(Zeller, *Aristotle*, Engl. trans., ii. 171.)

We may notice here in passing that Aristotle's division of corrective justice into two kinds—one dealing with voluntary transactions or contracts, and the other with involuntary transactions or delicts—is open to the same criticism as we have passed on the Roman division (p. 168, *supra*). His classification seems to be—

(1.) Contracts for the transfer of things in property—buying (*πρᾶσις*), and selling (*ὠνή*); for, of course, the rights and duties and the justice of buyers and sellers are different:

(2.) Contracts for the temporary transfer of money in loan (*δανεισμός*); and temporary transfer of things —pledge in security (*ἐγγύη*):

(3.) Contracts for the temporary use, hire of things (*χρῆσις*), or for the deposit of things (*παρακαταθήκη*), and the corresponding contract of letting (*μίσθωσις*).

But when he deals with involuntary transactions he gives two classes:—

(1.) Delicts committed by fraud—theft, adultery, administration of drugs, procuring for defilement, enticement of slaves from their master, murder by treachery, perjury:

(2.) Delicts committed by force—assault and battery, violent detention, murder, rape, assault with intent to maim, abuse, insult.—(Bk. V. ch. 2.)

The voluntary transactions are divided according to ends or purposes in relation to things; the involuntary according to the means used by the delinquent.—(*Cf.* Grant's *Aristotle*, ii. 108, note; Holland, *Jur.* 271.) The discussion in the *Rhetoric* (i. 13) deals entirely with law from the point of view of wrong-doing. The subject dealt with is forensic prosecution.—(*Cf.* Cope and Sandys, i. 245.)

Justice with Plato is sometimes physical and sometimes metaphysical. He has not shaken off the associations of the Pythagoreans and the older physicists; but he has a clear view of a divine idea which resides in the individual soul, as well as in the State and the physical universe. The old doctrine of the mean—*μηδὲν ἄγαν*—appealed to ordinary things—ordinary life and ordinary experience, for its standard. The standard of justice is therefore really custom—the tradition of Greek society.

With Aristotle, on the other hand, an attempt is made to make the idea precise and scientific. Justice is mathematical. It is equality—an arithmetical mean—measured in number by means of money.[1] But men are evidently different in their attainments. Being unequal as persons, how can we give them equal shares of external things? His answer is, We can have *proportional* equality. If the husbandman is to the cobbler as grain is to shoes, then we can measure the value of their work, and inferentially the value of the men themselves. In proportion the product of the extremes is equal to the product of the means—absolutely physically equal; and so Aristotle triumphantly points to this result as saving both his doctrine of equality and his idea of proportion. But the attempt to measure men in this way must end in absurdity. If men are mere machines, we may of course compare their respective products, or the number of foot-pounds of work they do. But men are not *mere* machines. The moral, intellectual, or religious char-

[1] Aristotle pressed etymology into his service by deriving *δίκαιον* from *δίχα*—twain. See Grant, ii. 114.

acter even of a slave adds to his value. Among freemen, a scholar, an artist, or a merchant, might be useless as a soldier or field labourer. Before we apply the ratio, we must make sure that all the terms belong to the same class. This is an important problem which is not solved by proportion. Any mathematical and rigid proportion is quite as useless as equality, except in very simple commercial transactions, and even there we find a reduction of the rate of price may be made in wholesale transactions.

In real life we cannot distribute offices by proportion. One man must get the place, and ninety-nine candidates will be disappointed. Two men may be nearly equal in the special acquirements necessary for the post. The unsuccessful one may have many relevant accomplishments, and yet he gets *nothing*. It often happens that such decisions are given for arbitrary reasons or accidental circumstances. It may be said these are injustices. Perhaps: they are honest and bare-faced compared with those which proportion (if it is to be really acted on) would entail with its pretence of measurement and its arbitrary treatment of spiritual qualities under the categories of number and quantity. How could we divide the offices of King, Archbishop, Premier, Lord Chancellor, Commander-in-Chief, among five men by any rule of proportion? Are we to estimate their qualities by their salaries? In short, proportion as expounded in the fifth book of *The Ethics* is a very rough metaphor. The science is pseudo-science. Is it not a play on the meanings of λόγος—reason and mathematical ratio? The discussion in the *Politics* (iii. 9) supplies an excellent criticism of the theory in question. The good life (τὸ εὖ ζῆν) which Aristotle regarded as the end of the State was life like the Athenian. Thus again the principle of justice, custom, and the practical "insight" of the good man are assumed.—(Zeller, *Aristotle, &c.* Engl. trans., ii. 170-177.)

The late Professor Lorimer attempted to revive the doctrine of proportion and apply it to modern politics; but

the modifications which he was constrained to make show that it is impossible to measure the spiritual forces of men and states by means of material things.

Δικαιοσύνη is an individual virtue, though exercised for the benefit of society and the State. Like courage, it resides in the individual heart, and society reaps the advantage. If the duty of deciding legal points may devolve on the individual citizen, then he must have this virtue in a particular form—the *δικαιοσύνη δικαστική*. But this justice and the justice which ought to guide the claimants or litigants will meet in the objective principle of justice—*τὸ δίκαιον*.

In the New Testament the word reaches the highest development in this direction. It occurs nearly one hundred times, and is translated in the English version "righteousness." In the Old Testament the same word has always a concrete connotation. The Hebrew words translated in the Septuagint by *δικαιοσύνη* are those which we previously discussed under the head of Right. In the Vulgate New Testament *Justitia* is used, and it is just possible that the legal associations which cling so much more closely to the familiar Latin word have had a large share in causing the theological differences in the various branches of the Latin Church as to faith and works. But we must leave the Greek word here, for the New Testament usage shows us law vanishing into religion.[1]

In like manner, as will be observed presently, the Schoolmen, who carried on the traditions of the ancient world in philosophy, politics, and law, treated justice both on its practical and its ideal side; but as they strove to subordinate the State to the Church, so they included jurisprudence within the scope of theology.

[1] Dr. James Drummond in the *Hibbert Journal*, i. 83, on "The Righteousness of God."

SECT. V.—MEDIÆVAL USAGE.

In the Middle Ages we find justice treated in many modes which still prevail in modern usage. The idea is materialised and identified with the actual positive legal and political institutions of the State. Thus we have Courts of Justice; the College of Justice in Scotland; Justices of the High Court; Justices of the Peace; Ministers of Justice on the Continent. This materialisation of justice in persons, things, or acts runs parallel with the struggle to centralise the State in the king. Justice may be (1) persons—Justices; (2) a thing, which English kings undertook not to sell; and (3) acts—execution of criminals, legal process, &c. This is noted in the following extract from old French law prior to the Revolution :—

"Justice est une vertu de droict qui faict en l'homme ce parquoy il est dict juste.

"Aulcunesfois appelle len justice, une destresse qui descend de droict qui est faite sur aulcun : Si comme len dict de aulcun qui justifie bien ses hommes. Telle justice est faicte par prendre meubles, ou fieu, ou corps.

"Aulcunesfois appelle len justice le Bailly ou aultre Justicier quelconque, qui a povoir de justicier ses hommes : si comme len dict, la Justice du Roy tient ses assises en ceste Ville.

"Aulcunesfois appelle len Justice, la peine qui est enjoincte à aulcun par sa desserte ; si comme len dict, Je vy faire la Justice du Roy, d'un larron, que je vy pendre. De toutes ses manieres de Justice use len souvent en Court laye."—*Le Grand Coustumier du pays et Duché de Normandie*, chap. iii. (Bourdot, iv. p. 2).

In Early English "Riht" is Justice, as in the laws of Æthelstan (Thorpe, p. 85). In addition to what we have said with regard to Right (p. 45, *supra*), we may again observe here that the Roman notion of Justice springs from legal procedure (*Jus*), while Right owes its origin to substantive law; but these have become identified. Right, with all that it involves of straightness and measuring, implies the appeal to an expert who can measure fields. Although the multiplication table is no longer a mystery, it is not everybody at the present day who would attempt to calculate the area of a triangular

piece of ground. As we have already seen (p. 36, *supra*), the Babylonian and the Egyptian priests acted as judges in disputes as to boundaries. The earliest demand for right (straight measurement) meant, therefore, judicial right—justice; and justice would afterwards come to mean right, although in particular cases there might happen to be accidental variations from the ideal standard (p. 288, *supra*).

The later Norman-English usage is the same as in the passage quoted above from the *Grand Coustumier*.

The phrases, "Do right," "Do justice," and "Do duty" are all similar in meaning; the words "Right," "Justice," and "Duty" having more or less of a concrete character.

In the laws of Edward the Confessor on murder (chapter xv., Thorpe, 193) we read—

"si inveniri poterat (the homicide) justicie regis infra viii. dies interfectionis tradebatur." If he could be found within a year, "fieret de eo justicia."

The former justitia may be the man who holds office as justice; for in section 3 we read—

"ubicunque justitia regis vel alia quelibet justitia, cujuscumque sit, tenuerit placita vel justiciam, si minister episcopi fuerit, et ostenderit causam sancte ecclesie, ipsa prius ad finem deducatur, ad quem finem poterit racionabilius eo die. Justum est etiam ut Dominus ubique per servos suos honoretur."

In the Laws of William the Conqueror (Thorpe, p. 201) the Latin "Justiciarius" corresponds to the French "Justise." We have here in fact what Aristotle pointed out—Justice embodied in flesh.

In the Laws of Henry I. (Thorpe, p. 237), "Justicia Regis" is the man who represents the "Royal Justice." From this time onwards in the year-books the modern usage is common.

In the Statute of Marlborough already mentioned (1267) the "ministration of justice" is said to "belong to the office of a king"; and chapter I. provides that all persons shall "receive justice in the King's Court." The persons who used these phrases had no doubt concrete practical associations with

them, as we may gather from Coke's Commentary thereon in his Second Institute, where he says—

"1. That all men, high and low, must be justified,—that is, have and receive justice in the King's Courts of Justice."

"3. That all the subjects of the realm ought to be justified, that is submit themselves to the King's officers of Justice, according to law" (6th ed., pp. 101-103, "Statutum de Marlebridge").

So in the Great Charter King John undertakes to sell to no man, nor to deny or defer to any, Right or Justice.—*Rectum vel Justiciam* (chap. xxxix.).

Justitia is explained by Ducange as *jurisdictio, cognitio judicis.* Isidore (*Decr. Greg. IX.*, v. 40, 10) distinguishes *causa, judicium,* and *justitia.* The first is a case when put forward, the second is the same under discussion, and the third is when it is decided.[1]

Alta justitia is high justice—the *jus gladii,* as opposed to *justitia simplex*—inferior, depending on the royal justice.

Facere justitias is to hold courts,[2] and is so used by Eginhard; or it means to pay a debt.

Justitia is also applied to a district of jurisdiction or power; to a decree of a judge; and to a place of execution (*cf.* p. 160, *supra*).

It is applied to a right—*jus;* to a prestation—a tax; and a judicial fine.

This brings us to the point where *Justitia* is taken up by the modern languages.

SECT. VI.—MODERN DEVELOPMENT.

In modern times justice has developed in two directions —negative and positive. Arithmetical equality is an impossibility. Proportional equality is an hallucination. The next idea is to give all men "an equal chance"—*les carrières ouvertes.* This is an aspect of freedom. Strong free men, under a system of competition, will adjust themselves and

[1] *Cf.* the derivation of *causa* from *casus* with p. 57, *supra;* Ayliffe, *Parergon,* 147.

[2] *Law of Edward the Confessor,* p. 378, *supra.*

get into their proper places. If the game is fairly played, the losers may be content to take a second place and find it as good as the first—may even persuade themselves that it is better. Society gets the benefit of the strongest—the survival of the fittest.

But it happens as often as not that anti-social vices bring a man to the surface as effectually as social virtues. The survivor is fittest because he has survived. Society comes to see sometimes gross injustice in the ordinary economic processes of nature. To nature man is simply a product, and he may be waste like chemical refuse, or street sweepings. The conscience of individuals is hurt, and hence an attempt by conscious legislation to bring back justice to earth. Justice is not merely obeying any laws, however bad; it demands that laws should conform to a higher ideal in their substance. It struggles to save everything in human shape. It draws no artificial line even at the brutes, for it attempts to protect them from cruelty and injustice. It knows no boundaries of nations and states except to facilitate administration and jurisdiction. There is a justice to foreigners.

Hence all the activity of our modern social legislation—churches, schools, museums, libraries, art galleries—public health, lighting, water supply, conveyance, poor laws, and lunatic asylums. The poor could not get these for themselves. It is recognised that they have a claim to the good life (τὸ εὖ ζῆν); it is said to be a just claim, and so it is made a legal right.

But what is the criterion of justice? Custom? Should men learn to be content with the sphere in which they are born? Should we make natural divisions of men into rigid castes? Are we not educating men beyond their station in life and making them discontented with their lot? But, on the other hand, is there not a divine discontent? Have men not ideals that they must realise? If those ideals are human, does justice not demand that they should be realised? But here we seem to go in a circle, for the question is now

asked if our ideals are just? Hence the attempt to find some criterion outside of custom or tradition on the one hand, and the mere existence of the ideal on the other.

SECT. VII.—EQUITY.

Where a society has reached the stage of true law—a conscious adjustment of rights and duties—and particularly if it has anything like a code, the inadequacy of the law to meet all the varied affairs of actual experience ultimately forces itself on men's attention. Hence the idea of equity to correct or supplement justice. When justice has become identified with the material details of law, equity is applied to the spirit which ought to animate these.

The word used by Aristotle in this connection is *ἐπιείκεια*, fairness, reasonableness. The adjective *ἐπιεικής* is used by Homer in a physical sense—"fitting—not huge," as applied to a tomb (*Iliad*, 23, 246). In the *Odyssey* (12, 382) it is applied to a penalty—as fair. The later usage was "equitable," as opposed to merely "just" (*δίκαιος*). The account given by Aristotle (*Ethics*, v. 14) is still classical:—

"Whenever the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate, or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, would admit, and, had he known it, would have rectified in legislating.

"That which is equitable, then, is just and better than one kind of justice; not, indeed, better than absolute justice, but better than the error of justice which arises from legal generality. This is in fact the nature of the equitable; it is a rectification of law where it fails through generality. For the reason why things are not all determined by law is that there are some things about which it is impossible to lay down a law, and for which a special decree is therefore necessary. For where the thing to be measured is indefinite, the rule must be indefinite, like the leaden rule that is used in Lesbian architecture; for as the rule is not rigid, but adapts itself to the shape of the stone, so does the decree to the circumstances of the case. We see, then, what is the nature of equity, and that it is just, and what is the justice to which it is superior.

"From this it is easy to see the nature of the equitable man; for one who in his moral purpose and action aims at doing what is equit-

able, who does not insist upon his rights to the damage of his neighbours, but is content to take less than his due, although he has the law on his side, is equitable, and his moral state is equity, which is a kind of justice, and not a different moral state."—(Welldon's Trans., p. 172.)

The Latin *æquus* has also a physical reference, meaning level or equal (Clark, *Jurisprudence*, p. 364). The latter connects the idea with Aristotle's justice. So Cicero (*Topics*, 4, 23) says, "Valeat æquitas quæ paribus in causis paria jura desiderat." This may be merely an echo of Greek philosophy and bad etymology; but the usage is constant that *æquitas* was a following of the meaning or spirit as opposed to the letter of the law. Thus in the *Institutes* (iii. 1, 9) we are told that the prætor introduced *bonorum possessio* for children, *naturali æquitate*, in opposition to the Twelve Tables. Even the Edict —itself written law—was administered by the prætor subject to a spirit of *æquitas*. As Ulpian says (L. 14, § 13, *de relig. &c.* (11, 7)), "Et generaliter puto judicem justum non meram negotiorum gestorum actionem imitari sed solutius *æquitatem* sequi." In the discussion of tradition (*Inst.* ii. 1, 40) *naturale jus* and *naturalis æquitas* are evidently identified. But so far back as the time of Cicero (*De off.* iii. 16) we find a rule of law (*jus*) pleaded on one side, a rule of equity (*æquitas*) on the other. The subsequent chapter (17) seems to identify equity with a *lex naturæ*.

In the following text of Scævola we come near the modern Scottish idea of equity, as covering a region of law where rigid rules are inapplicable:—

"De accessionibus possessionum nihil in perpetuum neque generaliter definire possumus: consistunt enim in sola *æquitate*."

(L. 14, pr. D. *de diversis temp. præscr., &c.* (44, 3).)

The Schoolmen borrowed the Greek word, and St. Thomas Aquinas deals with it in his *Summa* (2, 2, *q.* 120). *Epicheia* is a subjective element of justice:—

"Legalis justitia dirigitur secundum epicheiam unde epicheia est quasi superior regula humanorum actuum."

The Greek word still survives in Roman Catholic theology

as a synonym of *æquitas*, as we see from Pietro Scavini's *Theologia Moralis Universa*, the 15th edition of which was published at Milan in 1896 (L. 1, § 231, Epikeja). St. Thomas (*l.c.*) is the sole authority quoted there.

Suarez, the last of the Schoolmen, in his great work, *De Legibus ac Deo Legislatore* (i. 2, 9), distinguishes *æquitas naturalis* from *æquitas legalis*. The former is identical with natural justice, a position for which he quotes L. 90, D. *de R. J.*: "In omnibus quidem, maxime tamen in jure æquitas spectanda est." The latter is a mode of amending or moderating the rigour of the law.—(*Cf. Epiikia*, vi. 6, 5.) It is an attempt to get from mere external form to the matter of law. We may see from Suarez that equity after all is only law. It is an attempt to fit law more exactly to men's affairs; just as comity (*i.e.*, benignity, favour) was an attempt to fit native law to the cases of foreigners.[1] In one chapter (ii. 16) he uses "epiikia" as synonymous with *interpretatio*—*i.e.*, jurisprudence, in the modern French sense.

So Astræa taught Artegall—

> "To weigh both right and wrong
> In equall ballance with due recompence,
> And equitie to measure out along,
> According to the line of conscience,
> When so it needs with rigour to dispence."
>
> (*Faerie Queen*, v. i.)

In the French *Code Civil*, as *justice* is applied to law (Arts. 4, 30), *équité* is used for justice in a wider sense:—

"Les conventions obligent non-seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature."—(Art. 1135.)

This connects the idea with natural law.

As the Romans borrowed equity from the Greeks, so have the English borrowed it from the Romans.—(Clark, *Jurisprudence*, p. 373.) Glanvill appears to use the word as equivalent to indulgence—*benignitas*. Bracton carries us back to Cicero:—

[1] Miller, *Law of Nature and Nations*, p. 124.

"Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene coæquiparat; et dicitur æquitas quasi æqualitas, et vertitur in rebus in dictis et factis hominum. Justitia in mentibus justorum quiescit: inde est quod, si velimus loqui proprie, dicemus judicium æquum non justum, et hominem justum non æquum."—(i. 4, 5.)

Thus Bracton would admit with Aristotle that absolute justice was equity; but as the intention, however good—the *constans et perpetua voluntas*—might result in acts and deeds that were felt to be unjust, the notion of equity came to be associated with the external act or prestation rather than the internal state of the actor. The Greek usage, however, included both.

When equity in English law became hard and crystallised, it was a mere department of law—the difference being that the judges wore different robes and had a different mode of procedure as well as different substantive rules. We then find an appeal to morality—the law of God—religion—the law of the Church. As Snell explains, the development of English equity is a matter of history and not of principle (*Principles of Equity*, 2), and yet it was enacted by the Judicature Act of 1873 (36 and 37 Vict., cap. 66, §§ 24 and 25) that when the rules of equity and of common law differed, the rules of equity should prevail. This evidently assumed that they were, at least in general, more just. In fact, if we may be allowed to speak disrespectfully of so great and so beneficent an institution, English equity, like the early Roman equity, was a clumsy mechanical mode of amending a rigid mechanical law.—(Blackstone, i. 61; Hobbes, *Works*, vi. 3.)

In the earlier days of the East India Company, and when there was danger of injustice arising from the application of rigid law, the judges were instructed to follow the dictates of "justice, equity, and good conscience." This tended to operate another injustice by importing technical rules of English equity into cases where they were utterly inapplicable.—(Stokes, *Anglo-Indian Codes*, I. xvi. xxi.; Guthrie's

Savigny, 2nd ed., p. 61.) What the words no doubt meant was the moral common sense of an honest layman.[1]

When equity becomes law or right, then particular rights or particular obligations are called "equities,"—*e.g.*, "an equity of redemption" is a right to redeem: "an equity to a settlement" is a right of wife in certain circumstances. The "*equity* attaching to an overdue bill" may sometimes result in a burden or obligation. This phrase is translated into "defect of title" for the benefit of Scottish lawyers (Chalmers on *Bills*, 5th ed. 117). So it is enacted in the Indian Code of Civil Procedure (sect. 233):—

> "Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder."

That is to say, *assignatus utitur jure auctoris.* Equity meaning merely right, we may have competing equities, and so the Lord Chancellor (Selborne) may say (11 A.C. 30)—"I think the respondents have the better equity." At all events this sentence throws light on what may once have been meant by "the better right" (p. 123, *supra*).

In Scotland we have never had the separation of law and equity which prevailed in England. For us they were combined by Justinian. There is one well-known treatise on the subject—Kames on *Equity*—but it is useful only as a treatise on the mode of administering the law. The law has absolutely absorbed equity except to the extent after noted.—(Green, *Encyclopedia*, *s.v.*; *Wilton and Co.* v. *Osborn*, 1901, 2 K.B. 115.)

Scottish law borrowed much from France and Holland when they all regarded the Civil law as their common law, and latterly from England and America, so that the law is found sufficiently elastic of itself. In the law of trusts and some other branches, English equity cases are freely used in Scotland, and thus we reap the full benefit of English equi-

[1] *Cf.* New Zealand Arbitration Act,—Reeves, *State Experiments*, ii. 102.

table doctrines; but it must be borne in mind that these were largely borrowed from the Roman law.

But in certain cases, *e.g.*, deciding as to the custody of children, the Court is a court of equity, and the House of Lords has restrained any tendency to lay down rigid rules (*Symington*, L.R. 2 Sc. App. 415: *Beedie*, 16 R. 648: *Stevenson*, 1894, 21 R. (H.L.) 96).

So in matters of discretion — applications for special powers by trustees and such-like, the jurisdiction is wide and equitable. Again in exceptional cases of hardship the Court of Session, for cogent reasons, may withhold from a litigant a remedy which in other circumstances might have been allowed as a matter of course.—(*Grahame* v. *Swan*, 1882, L.R. 7 App. Ca. 547.) But we may go further and say that in the administration of all law equity must be kept in view—"Æquitas spectanda est." It is impossible to use a code like a book of interest tables. A layman relying only on a code would produce legal judgments comparable to the English literary compositions of some Indian authors. The grammar and the individual words used are correct; but the result is ludicrous. All interpretation assumes that the law in substance is equitable and just. And particularly in the apportionment of punishment judicial discretion must be tempered with equity.

In *Pirie* v. *Pirie*, 1873, 11 M. 941, the Court of Session, while regretting that the Civil law was not quoted so often in the Scottish Court as formerly, appealed to this law as deciding the case, and to equity, not in the English sense, but meaning plain justice, as a test of the justice of the result.

SECT. VIII.—REASON—REASONABLENESS.[1]

The word "reasonable" is extremely common in British statutes, and indeed in the whole of our legal literature.

[1] See on the subject of this and the following section two articles by Sir Frederick Pollock in the *Journal of the Society of Comparative Legislation*, 1900, p. 418; 1901, p. 204.

Natural equity and reason are associated by older writers (Maxwell on *Statutes*, 3rd ed., p. 364). It is an appeal sometimes to an objective standard, and sometimes to judicial determination.

It may mean (1) customary or natural in a wide sense; (2) adapted to an end; (3) moral, implying that the actor does not *unduly* interfere with the rights of others; (4) purely legal or rather equitable when a rule has come to be interpreted by the Law Courts. "Reasonable notice" under the Bills of Exchange Act or the Agricultural Holdings Act is ultimately customary notice, modified it may be by all the circumstances of the case, as estimated by "a reasonable man."—(Stroud, *Dict.*, *s.v.*) But in the case of bills the element of usage is more important, as it is in all mercantile affairs (Act, sect. 86).[1] "Reasonable aliment" to a person may be what is usual in his station of life, or what is adequate for his maintenance—physiologically natural. "Reasonable facilities" to be afforded by a railway company implies legal conduct.—Deas (Ferguson) on *Railways*, 564 *et seq.*, 616. In the Judicial Factors Act (12 and 13 Vict. c. 51) we find "reasonable diligence" in sect. 3, and in sect. 13 "good ordinary management." The conduct of a reasonable person approaches "moral" conduct.—(Sidgwick, *Methods of Ethics*, *passim*.) "I beseech you that ye present your bodies a living sacrifice unto God, which is your reasonable service,"—*τὴν λογικὴν λατρείαν*,—accordant with an idea—or perhaps moderate, not excessive—in accordance with *λόγος*—*ratio*.

The word *λόγος* carries us back to the Greek philosophers as in the definition of Chrysippus (quoted by Holland, *Jur.* 20). "*ὁ νόμος ὁ κοινός, ὅσπερ ἐστὶν ὁ ὀρθὸς λόγος διὰ πάντων ἐρχόμενος*," *κ.τ.λ.* The phrase there has theological associations, and refers to the reason which rules the universe and makes it Kosmos—the *Nous* of Anaxagoras. It was the precursor of the Christian *Logos*, the second person of the

[1] See Ryan *v.* Ridley, 19 T.L.R. 45.

Trinity, who created the world.[1] Both Plato and Aristotle speak of "*right* reason"—ὀρθὸς λόγος—*e.g.*, τὸ δὲ μέσον ἐστὶν ὡς ὁ λόγος ὁ ὀρθὸς λέγει.—(Aristotle, *Eth. N.* vi. 1.)

In our discussion of justice we have anticipated much that might be said of reasonableness. The Greek reason—λόγος—proportion—was the ordinary *customary* routine of nature—μηδὲν ἄγαν—not too much of anything. As Terence puts it in the mouth of one of his characters—

> "id arbitror
> Adprime in vita esse utile, ut *Ne Quid Nimis.*"
> (*Andria*, i. 1, 34.)

Even too much virtue might become a wrong. It might become *unreasonable.* As the preacher said—"Be not righteous overmuch; neither make thyself overwise: why shouldest thou destroy thyself?" (Ecclesiastes, vii. 16-17).

Gaius identifies *Naturalis ratio* with the *Jus gentium* (*Inst.* i. 1; ii. 66-69 *seq.*) He opposes *civilis ratio* to the *naturalis* (i. 158), and uses *civilis ratio* for the civil law (ii. 110); Ulpian (xxiv. 16) speaks of the *ratio juris civilis,* the spirit of the civil law. Comparing Gaius ii. 66 with *Inst.* ii. 1, 40, we see that Gaius uses *Naturalis ratio* where Tribonian uses *Jus naturale* and *Naturalis æquitas.*

Cicero in *De officiis* (iii. 23) speaks of "ipsa naturæ ratio quæ est lex divina et humana," and in the theory which he propounds in the *De Legibus* (i. 18) he defines lex as "ratio summa, insita in natura, quæ jubet ea, quæ facienda sunt, prohibetque contraria." This was an adoption of the Greek idea of Kosmos—"deorum immortalium vi, natura, *ratione,* potestate, mente, numine, sive quod est aliud verbum, quo plenius significem quod volo, naturam omnem regi" (i. 21.) This sentence combines all the ideas of natural law, reason, and divine power, and prepares us for the substitution of the Christian idea of God[2] by St. Thomas Aquinas who says, "Lex æterna nihil aliud est quam summa ratio divinæ

[1] Hobbes' *Works*, iii. 409; iv. 112; Max Müller, *Last Essays*, 2nd ser., pp. 288, 343, &c.

[2] See note, p. 394, *infra.*

sapientiæ, secundum quod est directiva omnium actuum et motionum" (1, 2, *q.* 93, 1). Suarez (*De Leg.* i. 3, 6) explains that this eternal law of the Schoolmen is the *Lex Divina* of Plato, the "ratio gubernatrix mundi"; he probably refers to the passage in the *Laws* (iv. 716).

Reason has thus developed in two directions in its application to law. On the one hand it is the foundation of law, and carries us back to the divine idea of the Greek philosophers and of the theological schoolmen, and such modern usage as in the title of Professor Dahn's reply to Von Ihering, "Die Vernunft im Recht." On the other hand, it became positive law in Gaius, and has been identified with the details of custom and the ordinary nature of things in the ordinary English and Scottish legal use of the word "reasonable" already noted.

An example of a purely legal usage is found in the early English use of *pars rationabilis*, applied to the dowry of a wife and the legitim of children. Magna Charta (cap. 26), in dealing with freedom of bequest, excepts these rights,—"Salvis uxori ipsius et pueris rationabilibus partibus suis." Blackstone (ii. 133, 493) says that "Bracton lays down the doctrine of the *reasonable part* to be common law," and refers to Glanvill, Fleta, the Year-Books, and other authorities, to whom we may add Britton, on the writ *de rationabili parte* (iii. 9, 1, where the phrase is "Sa renable partie del heritage."—*Cf.* Ducange, *s.v.* "rationabile," and Year-Book 20 Edward I. p. 20.) The same phrases "a reasonable terce or third," "reasonable dowrie" occur in the older Scots law books (*Reg. Maj.* i. 3, 2; ii. 16, 1, and 37; Stair, iv. 3, 11).[1]

The word is applied to taxation in the Statute of Westminster (sect. 36) passed in the third year of Edward I. of England. The Petition of Right in its preamble quotes a statute of 25 Edward III. of England, which spoke of loans,

[1] *Cf.* the *Ratio legis Falcidiæ* (*Institutes*, ii. 22, 1; Brissonius, *s.v.*) and the use of *Jus naturæ* in the same connection in the Decretal of Boniface VIII., given in *Sexti Decretales* (iii. 11); p. 395, *infra*.

which were "against reason and the franchise of the land."[1] The preamble of the Bill of Rights (1 Will. and Mary, session 2, chap. 2) speaks of similar acts as being "contrary to the known laws and statutes and freedom of this realm."

In some cases we find "reason" applied to law in general, or justice. The phraseology of the Statute of Westminster (20 Edward III.) is interesting in this connection. Chapter I. speaks of judges doing "law and right" (*faire ley et droit*), while chapter II. uses the phrase do "right and reason" (*facent droit et reason*). But as applied to particular legal propositions the usage does not differ from the ordinary popular one. The "reasons" given by judges for their decisions are purely legal statements, and may be bad as well as good. According to Ducange "ratio" means "jus, causa, lis, judicium; res, dominium, bona, facultates," &c.

The maxim "Cessante ratione cessat ipsa lex" is sometimes quoted as if it were universally binding in judicial procedure; but it rather applies to legislation, and implies that when certain conditions are not present the law is not applicable.—(*Cf.* Roby's *Intr. to Digest*, p. 103; Broom's *Maxims*, 7th ed. 126; Maxwell on *Statutes*, 3rd ed. p. 63, and chap. viii.) The danger of appealing to reason when the law was clear was repeatedly emphasised by the Roman lawyers:—

"Non omnium, quæ a majoribus constituta sunt, ratio reddi potest."—(Julianus, L. 20, D. *de Leg.* &c. (1, 3).)

"Et ideo rationes eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his quæ certa sunt, subvertuntur."—(Neratius, L. 21 D. *Eod.*)

This is the doctrine laid down by the Lord Chancellor (Westbury) in *Ralston* v. *Hamilton* (p. 228, *supra*). The clearness and certitude of the law are for a judge sufficient reason. To discuss other reasons would introduce confusion and injustice.[2]—(*Cf.* pp. 356, 357, *supra.*)

[1] *Cf.* the use of "resonablement" and the English translation in 18 Edw. III. cap. 2; "renable eid," 25 Edw. III. stat. 5, cap. 11; and "pro prætio rationabili," Statute of Labourers, 23 Edw. III. cap. 6.

[2] *Cf.* Theophrastus, Ἁπάντων ζητοῦντες λόγον ἀναιροῦσι λόγον.—Quoted by Hooker, *Works*, i. 228.

Once more the indefiniteness of the substantive law of nations, so often identified with natural law, presently to be noticed, is shown by the combination of "reason, justice, the principles of international law, and the equities of the case," in Rule (c) Article iv. of the Treaty of Washington, 1897, between Great Britain and Venezuela.

When a soldier or sailor gets a legally defined and reasonable allowance of food it is called "a ration." This usage is mediæval (see Ducange, *s.v.*) and brings us to purely physical associations.—(*Cf.* Competency, p. 56, *supra.*)

Another modern physical application may be found in the word "Rates" and the Law of Rating. These are money payments.—(Balfour Browne, 2nd ed., p. 24, &c.)

SECT. IX.—NATURAL LAW.[1]

This phrase is used as synonymous with justice, equity, religion.

In our discussion of the Greek idea of justice (*δίκη*) we have seen that it was applied to inanimate and animate nature as well as to men and states. To the early Greek, nature (*φύσις*) was not dead matter but living spirit. The philosophers substituted hylozoism for the popular animism. The world was not inhabited by gods and spirits, but was itself a living entity. It was easy to transfer to the physical universe ideas of rule, politics, and law.[2] It is really a survival of this idea which we meet in the famous definition of *jus naturale* given by Ulpian—the Kosmos—the rational universe.

In the *Ethics* of Aristotle (v. 7) we have the distinction of natural and conventional applied to human justice. The former is in all places equally valid, and whether accepted or rejected of men is equally just. In the *Rhetoric* (i. 10, 13, and 15) he divides law into "particular" and "universal," and by universal he means the "law of Nature" (*κοινὸν δὲ*

[1] See note, p. 386, *supra.*

[2] Burnet, *Early Greek Philosophy*, p. 13.

τὸν κατὰ φύσιν), which is always equitable and never changes; and in the first passage referred to (10) he appears to identify this with unwritten law as opposed to the written law of the State. We shall see presently that in this sense the phrase still survives.

Passing over later writers, to be noticed presently, we find Locke (*On Government*, ii. 2, 6) affirming that "The state of nature has a *law of nature* to govern it." The unhistorical assumption of this law corresponds to the unhistorical state in which it prevails. This is illustrated in the following passage, where Spenser describes the degeneration of his time owing to the wandering of the stars, but does not speak of nature :—

"For during Saturnes ancient raigne it's sayd
That all the world with goodnesse did abound :
All loved vertue, no man was affrayd
Of force, ne fraud in wight was to be found :
No warre was knowne, no dreadful trompets sound :
Peace universal rayn'd mongst men and beasts :
And all things freely grew out of the ground.
Justice sate high ador'd with solemne feasts,
And to all people did divide her dred beheasts."

(*The Faerie Queene*, bk. v. *Int.*)

But it is also applied to an ideal system either existing in the future or in the minds of men. So Shelley criticises the society with which he was acquainted by an appeal to nature, but in a modern sense :—

"Nature !—No !
Kings, priests, and statesmen blast the human flower
Even in its tender bud.
. . . . . .
force
And falsehood hang even o'er the cradled babe,
Stifling with rudest grasp all natural good :
. . . . . .
How withered all the buds of natural good !
No shade, no shelter from the sweeping storms
Of pitiless power ! On its wretched frame,
Poisoned, perchance, by the disease and woe
Heaped on the wretched parent whence it sprung
By morals, law, and custom, the pure winds
Of heaven, that renovate the insect tribes,
May breathe not." (*Queen Mab*, iv.)

The comfortable person pleased with the present thinks that any change would be for the worse, a feeling which

> "Makes us rather bear those ills we have,
> Than fly to others that we know not of."

To this person the law of nature is *quieta non movere.* Whatever is, is right; it must be natural because it is.

The truth is that the idea is negative. Natural law is something not positive law—a little different—perhaps better. The standard may be past, present, or future. The state of nature in the past was a figment of the imagination like the millenium of the Christian, or the ideal system of the philosopher. It should be noted that, as with the phrase "natural rights,' to be noticed presently, the phrases "natural law" and "natural laws" are ambiguous. They may be analogous to "statute law," "canon law," &c. (p. 307), or to "land laws," "sea laws," &c., as in the passage just quoted from Locke.

The *Jus naturale* of the Romans, which is the starting-point of all the modern theories, was a gigantic legal fiction. Authority was wanted for legal doctrines similar to the rules of the Twelve Tables. It was found in an earlier code from which the prætor drew his inspiration.

Cicero (*De Leg.* i. 7, 23) regards both gods and men as united in society, and hence there is a law common to them (both *jus* and *lex*).[1] If God created man the law is involved in man's nature, and God may be regarded as the creator or legislator, and one obvious mode of discovering this law is by the study of psychology (*ib.* 23)—the nature of man. Grotius adopted this view (*De J. B. et P.*, Proleg. 7 and 9).

Having the idea of society in which all rational beings participate, gods as well as men, law (*jus*) is an essential notion springing from this relation. All other legal ideas follow, without much straining of the imagination. Paul, L. 11, D. *de jure et just.* (1, 1), identifies *jus naturale* and

[1] *Cf.* Hooker, *Works*, i. 231, 273.

morality—"Quod semper æquum ac bonum est." Cicero, in the chapter where he contrasts the *jus civile* and the *lex naturæ* (*De Off.* iii. 17), speaks of the latter as the *jus gentium*, a wider system of law and right than that which prevails in the narrow state, and maintains that when they differ the *jus civile* should follow the *jus gentium*.

"Itaque majores aliud jus gentium, aliud jus civile esse voluerunt: quod civile non idem continuo gentium, quod autem gentium, idem civile esse debet."

Gaius (i. 82, &c.) speaks indifferently of *jus gentium* and *naturalis ratio* (*cf.* i. 78 and 89). The two ideas are combined in his definition (i. 1) of *jus gentium*, for it was enacted by *naturalis ratio*; and again (i. 84-85), he contrasts the rule of the *jus gentium* with the "iniquitas rei et inelegantia juris"—*i.e.* injustice in substance and illogicalness in form.

The persons who have rights under this system, which may differ from the positive civil law, are *naturales*, as *e.g.* children. In like manner we find "natural" obligations recognised by Gaius, and the quasi-statutory embodiment of the *jus naturale* in a *lex naturæ*. Gaius speaks repeatedly of a rule of the law of nations (i. 83). Cicero indeed argues (*De Leg.* i. 6, 18) that this supernatural *lex naturæ* was prior to the *jus naturæ*. It was an unwritten *lex* prior to all written laws, prior to the very State itself.

The views of Cicero powerfully affected those of the Fathers, and subsequent speculators. If Nature were personified it might cover all the various forms in which God was conceived, from Pantheism to Monotheism. As St. Chrysostom says, "When I speak of Nature I mean God, for he is the author of Nature." "*ὅταν δὲ εἴπω τὴν φύσιν, θεὸν λέγω, ὁ γὰρ τὴν φύσιν δημιουργήσας αὐτός ἐστιν.*"—(Quoted by Barbeyrac in note to Grotius, *De J. B. et P.*, Proleg. 11.)[1]

St. Thomas (*Summa*, 1, 2, *q.* 91, 2) maintains that there is a *lex naturalis*, that is, a code of rules for the guidance of men as rational beings in so far as they participate in a higher,

[1] *Cf.* Gloss on the word "Natura" in Dig. I. i. 3.

absolute, eternal law. But the views of St. Thomas, as we observed before, will be discussed more appropriately under religion. In modern Catholic treatises (Scavini, i. § 155) *lex naturalis* is defined as by St. Thomas, and the rules are said to be given articulately in the Decalogue, which is defined as "lex naturalis et divina, in decem precepta distributa," &c. The law of nature is now statute.

In the second sentence of the *Decretum*, Gratian says that the law of nature is contained in the Law and the Gospel —*i.e.* what the Westminster Confession calls "The Moral Law" (p. 414, *infra*). But in the *Decretales Greg. IX.* (iii. 26, 16 and 18), the *legitima portio* of one-third is said to be awarded *jure naturæ* (*cf.* "Portion-natural," 4 Paton's Appeals, 609).

And finally we get "natural rights" (*jura naturalia*) in the American Declaration of Independence and the French Declarations of Rights (D. G. Ritchie, *Natural Rights*). This is a logical development of the idea into details similar to the Roman one already noticed, but of a more abstract character. "Natural" rights are analogous to "statutory" rights or "contractual" rights (p. 125, *supra*). The natural rights are defined and sanctioned by the law of nature; whatever is meant by the one is meant by the other, and that is merely an ideal somewhat different from what we find in experience.—(*Cf.* Menger, *The Right to the Whole Produce of Labour.*) Most of the Continental systems of natural law were substantive systems, which the authors wished to see realised. Jurisprudence with them means positive law (possible, if not actual) and not mere philosophical theory or a system of forms. A striking proof of this fact will be found in the anonymous volume, formerly attributed to Diderot and now to Morelly, published in 1755 under the title, *Code de la nature, ou le véritable esprit de ses loix de tout tems négligé ou méconnu. Partout, Chez le vrai sage.*— (Menger, *op. cit.* 63.) Part IV. gives in articulate sections a model of legislation conform to the intentions of nature (pp.

189-236). There are here set forth laws fundamental, distributive or economic, and laws dealing with government, police, marriage, education, &c. Moral philosophy and metaphysics are, so to speak, expressly repealed (p. 227). There is also proposed a highly artificial civil service, comprehending all members of the state.

A profitable discussion of the theory of Spinoza on this subject would be more appropriate to the metaphysical aspect of jurisprudence. He deals with natural law in the *Ethica* (iv. 18, 31, 35, &c.); *Tractatus Politicus* (cap. 2, 3); and *Tractatus Theologico-Politicus* (cap. 16). One important point may be noticed. Although Spinoza identifies the *right* of an individual with his *power*, and every individual acts according to the rules of his *nature*—*e.g.* big fish eat little ones, yet *reason* is part of the nature of man, and thereby man judges what is *useful* for his own preservation and happiness. This is a frank recognition of utilitarianism, and anticipates more modern ideas (*cf. Eth.*, iv. 35, cor. 2: *Tr. Theo.-Pol.* 16, 9).

Thomas Hobbes is more interesting to the English reader, for we find in his works all the main theories associated with the name of Austin and in a much more readable form. Hobbes' purpose was political rather than jural. In his preface (II. xxii. Molesworth's ed.) he says his purpose was—

"Not to define aught which concerns the justice of single actions, but leave them to be determined by the laws. Next, not to dispute the laws of any government in special, that is, not to point which are the laws of any country, but to declare what the laws of all countries are."

Hobbes may also be classed as a utilitarian, as when he says (iii. 146)—

"The science of virtue and vice is moral philosophy; and therefore the true doctrine of the laws of nature is the true moral philosophy. But the writers of moral philosophy, though they acknowledge the same virtues and vices, yet not seeing wherein consisted their goodness, nor that they come to be praised *as the means of peaceable, sociable, and comfortable living*, place them in a mediocrity of passions."

As Hobbes' political theory is cast in a legal mould, his

definitions are instructive. He points out that *jus* and *lex*—right and law—ought to be distinguished :—

"The RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently of doing anything which in his own judgment and reason he shall conceive to be the aptest means thereunto."

"By LIBERTY is understood . . . . the absence of external impediments" (*cf.* p. 96, *supra*).

"A LAW OF NATURE, *lex naturalis*, is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same ; and to omit that by which he thinketh it may be best preserved. For though they that speak of this subject use to confound *jus* and *lex*, *right* and *law*, yet they ought to be distinguished : because RIGHT consisteth in liberty to do or to forbear : whereas LAW determineth and bindeth to one of them : so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent" (iii. 116 : *cf.* 276).

"As the right of possession is called dominion, so the right of doing any action is called AUTHORITY" (iii. 148 ; *cf.* pp. 92, 115, *supra*).

"Our lawyers account no customs law but such as are reasonable, and that evil customs are to be abolished. But the judgment of what is reasonable and of what is to be abolished, belongeth to him that maketh the law, which is the sovereign assembly, or monarch" (iii. 253).

"The law of nature and the civil law contain each other, and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature . . . are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws, and not before, as being then the commands of the commonwealth, and therefore also civil laws, for it is the sovereign power that obliges men to obey them. For in the differences of private men to declare what is equity, what is justice, and what is moral virtue, and to make them binding, there is need of the ordinances of sovereign power and punishments to be ordained for such as shall break them, which ordinances are therefore part of the civil law. The law of nature, therefore, is a part of the civil law in all commonwealths of the world. Reciprocally also the civil law is a part of the dictates of nature. For justice—that is to say, performance of covenant and giving to every man his own—is a dictate of the law of nature. But every subject in a commonwealth hath covenanted to obey the civil law, either one with another, as when they assemble to make a common representative, or with the representative itself one by one, when subdued by the sword they promise obedience, that they may receive life ; and therefore obedience to the civil law is part also of

the law of nature. Civil and natural law are not different kinds, but different parts of law, whereof one part being written is called civil, the other unwritten, natural. But the right of nature—that is, the natural liberty of man—may by the civil law be abridged and restrained; nay, the end of making laws is no other but such restraint, without the which there cannot possibly be any peace. And law was brought into the world for nothing else, but to limit the natural liberty of particular men in such manner as they might not hurt, but assist one another and join together against a common enemy."—(*Ibid*, 253-254).[1]

To this we may add his account of natural obligation:—

"Now if God have the right of sovereignty from his power, it is manifest that the *obligation* of yielding him obedience lies on men by reason of their weakness. . . . There are two species of *natural obligation*. One when liberty is taken away by corporal impediments, according to which we say that heaven and earth and all creatures do obey the common laws of their creation. The other, when it is taken away by hope or fear, according to which the weaker, despairing of his own power to resist, cannot but yield to the stronger. From this last kind of obligation—that is to say, from fear or conscience of our own weakness in respect of the divine power—it comes to pass that we are obliged to obey God in his natural kingdom, reason dictating to all, acknowledging the divine power and providence, *that there is no kicking against the pricks*" (ii. 209).

Elsewhere rejecting the doctrine referred to above (p. 119, *supra*), he says:—

"The right of nature whereby God reigneth over men and punisheth those that break His laws is to be derived not from His creating them, as if He required obedience, as of gratitude for His benefits, but from His *irresistible power*" (iii. 345; *cf.* ii. 206).

If we ask what are the laws of nature, he gives a detailed account of justice, equity, and the precepts of the Décalogue, summing them up in the precept, "Do not that to another which thou wouldst not have done to thyself" (iii. 144).

"The laws of nature are immutable and eternal, for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest, can never be made lawful" (iii. 145).

[1] *Cf.* the lines of Lucretius, v. 1141 *et seq.*:—

"Res itaque ad summam faecem turbasque redibat,
Imperium sibi cum ac summatum quisque petebat.
Inde magistratum partim docuere creare
Juraque constituere, ut vellent legibus uti.
Nam genus humanum, defessum vi colere aevom,
Ex inimicitiis languebat; quo magis ipsum
Sponte sua cecidit sub leges artaque jura."

What is meant by lawful? Hobbes harps on reason, which is what recommends itself to him, and appeals for support to Christian revelation as accepted by the Church of England.—(iii. 367.) For the individual subject to the law the rules laid down by the sovereign and his representative, the judge, are final. Even the interpretation of the law of nature is authentic, "not because it is [the judge's] private sentence, but because he giveth it by authority of the sovereign, whereby it becomes the sovereign's sentence, which is law for that time to the parties' pleading."—(iii. 263.) This is a rule of expediency, and may in some cases be justified by saying that the parties are barred (estopped) by submitting their dispute to the judge. It is a rule of law, enforced in many forms, but gives no assistance to the decision of the question—What is justice? As to the judge, he must accept the laws as final, except where there is no express law, when he falls back on the law of nature:—

"In all courts of justice the sovereign, which is the person of the commonwealth, is he that judgeth; the subordinate judge ought to have regard to the reason which moved his sovereign to make such law, that his sentence may be according thereunto, which then is his sovereign's sentence, otherwise it is his own, and an unjust one?"—(iii. 257.)

It is proper to notice in passing that penal laws, according to Hobbes, are commands addressed to—

"the ministers and officers ordained for execution. For though every one ought to be informed of the punishments ordained beforehand for their transgression, nevertheless the command is not addressed to the delinquent, who cannot be supposed will faithfully punish himself, but to public ministers appointed to see the penalty executed. And these penal laws . . . are sometimes called judgments. For all laws are general judgments or sentences of the legislator, as also every particular judgment is a law to him whose case is judged."—(iii. 272.)

Hobbes' view of the duty of a judge is the ordinary one of the law, to some extent amended. Thus—

"Princes succeed one another, and one judge passeth, another cometh; nay, heaven and earth shall pass, but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore all the

sentences of precedent judges that have ever been cannot altogether make a law contrary to natural equity, nor any examples of former judges can warrant an unreasonable sentence or discharge the present judge of the trouble of studying what is equity in the case he is to judge from the principles of his own natural reason."—(iii. 264.)

This is judicial individualism pure and simple, and points to an abuse of precedent, of which Hobbes elsewhere complains, and so a few pages further on he says—

"The intention of the legislator is always supposed to be equity, for it were a great contumely for a judge to think otherwise of the sovereign. He ought therefore, if the word of the law do not fully authorise a reasonable sentence, to supply it with the law of nature, or, if the case be difficult, to respite judgment till he have received more ample authority.—(P. 267.)

"The incommodity that follows the bare words of a written law may lead him to the intention of the law, whereby to interpret the same the better, though no incommodity can warrant a sentence against the law. For every judge of right and wrong is not judge of what is commodious or incommodious to the commonwealth."—(P. 268.)

These doctrines are very much what we find in our law-books. The judge must administer the law, and not criticise it. He must presume, if it is clear, that it is just (pp. 356, 390, *supra*).

What, then, is justice with the sovereign? This is answered by Hobbes in the following passage:—

"To the care of the sovereign belongeth the making of good laws. But what is a good law? By a good law I mean not a just law, for no law can be unjust. The law is made by the sovereign power, and all that is done by such power is warranted and owned by every one of the people, and that which every man will have so, no man can say is unjust. It is in the laws of a commonwealth, as in the laws of gaming, whatsoever the gamesters all agree on is injustice to none of them. A good law is that which is *needful* for the *good of the people*, and withal *perspicuous*."—(iii. 335.)

His subsequent exposition denounces unnecessary laws, and dwells at some length on perspicuity of laws, but what he means by "the good of the people" is not clear. Is it their material interests, or their spiritual interest also? It may be taken that it is laws which promote social ends, and protect the subjects from their enemies, for he has told us

(iii. 208) that "the obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them." But we get answers to our questions elsewhere. In his chapter "Of the Passions" he distinguishes good and evil—

"there being nothing simply and absolutely so, nor any common rule of good and evil, to be taken from the nature of the objects themselves; but from the person of the man, where there is no commonwealth; or in a commonwealth, from the person that representeth it: or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof" (iii. 41).

And in his chapter on Dominion, "concerning the duties of them who bear rule," he answers the question very explicitly, but it must be remembered that the ruler is not subject to the *civil* laws, but only to *natural* laws (iii. 252):—

"Now all the duties of rulers are contained in this one sentence—*the safety of the people is the supreme law.* For although they who among men obtain the chiefest dominion cannot be subject to laws properly so called, that is to say, to the will of men, because to be chief and subject are contradictories, yet it is their *duty* in all things as much as possibly they can, to yield obedience unto right reason, which is the natural, moral, and divine law" (ii. 166).

"But by *safety* must be understood not the sole preservation of life in what condition soever, but in order to its happiness. For to this end did men freely assemble themselves and *institute* a government, that they might, as much as their human condition would afford, live delightfully" (ii. 167).

He goes on to say that rulers "would sin against the law of nature (because against their trust, who had committed that power unto them) if they should not study, as much as by good laws could be effected, to furnish their subjects abundantly, not only with the good things belonging to life, but also with those which advance to delectation" (p. 168).

In the next section he raises the question whether princes ought to provide for the *eternal salvation* of their subjects according to the prince's belief and conscience, when they "believe [their subjects] to be in a damnable state." But he "leaves this difficulty in suspense." Hobbes' theory had broken down. We may leave it here for the present. Al-

though he rejects an external criterion of good, his appeal to reason is merely an appeal to custom and tradition. Hobbes gives his own prejudices, and those of the society to which he belongs, as ultimately rational. He does appeal to an external test in his criterion of "safety" or "happiness." But these are all insufficient, and hence he supports the whole by falling back on Divine law and a Divine revelation.

The ordinary and obvious criticism of Hobbes' theory is that the social contract implies law logically if not historically. The social contract is a statute of an extremely early parliament, and the common law is behind it, both to interpret it and supply its deficiencies. It is a fundamental law—a constitutional law—but even these men are compelled sometimes to revise. However short and vague you make the social compact, it is a mere compact, and nothing apart from law. (*Cf.* p. 124, *supra.*) But where does Hobbes find his principle that we must keep our bargains? Is this a term of the compact, a law, or his interpretation of it? Where does he find warrant for holding *me* bound because Adam and Eve made an agreement in the Garden of Eden? Where does he find the principle that I "acceded" to the social contract by not protesting as soon as I could speak? Where does he find the doctrine of personal bar, which prevents me from now opening up this transaction if I think it unduly onerous? If there is no court of equity to give me relief, I am bound not by contract, but by the law which is behind contract. We see that the relations which we have regarded as series of rights, duties, or laws (pp. 121, 199, and 316, *supra*), Hobbes presented as a series of contracts. It was a desperate attempt to reconcile order and freedom in a mercantile age and to a mercantile people.

Montesquieu, at the beginning of his *Esprit des lois*, gives as his definition of law, ridiculed by Austin, that they are the necessary relations which spring from the *nature of things*.[1]

[1] *Cf.* Diderot, *Principes de Philosophie morale*, where he defines laws as founded on the *nature* of particular things, combined with the *nature* of the beings to whom they have relations.

Laws of nature (*lois*) spring solely from the constitution of our being (chap. 2). It was perhaps these sentences that suggested to Professor Lorimer the *de facto* principle as a test of the justice of laws in substance. The natural laws mentioned by Montesquieu are not precepts of conduct, but statements of supposed facts as to man's nature (i. 2). Then, at a later stage (xxvi. 1), he discusses the various kinds of laws (*lois*) by which men are governed—natural law (*droit*), divine law (*droit*), the law of religion, canon or ecclesiastical law (*droit*), the law of nations, general political law, particular political law, the right of conquest, the civil law of each society, and domestic law. The height of human reason consists in knowing to which of these orders of laws the subject calling for legislation should be referred. In the following chapters he discusses a number of cases in which those orders of laws come into conflict. Montesquieu in enacting laws would consider the nature, history, institutions, geographical situation, and climate of the territory of a people. He would also consider the end, proximate as well as remote, of the legislative act (i. 3). He has enormously widened the meaning of the word "Nature." He accepts autocracy, tyranny, slavery, and polygamy as facts, and discusses what laws apply to each. We may infer from his discussion that the end of legislation is the maintenance of existing institutions. He appears also to extend the meaning of "reasonable" by recognising a mean —a moderate government—though not ideally perfect—"que l'excès même de la raison n'est pas toujours désirable, et que les hommes s'accommodent presque toujours mieux des milieux que des extrémités (xi. 6; *cf.* xi. 4, 5; xxiv. 7; v. 8; xxviii. 38).

Still another view of the scope of natural law has been taken in more recent times. The following sentences represent fairly the doctrines so eloquently maintained by Professor Lorimer:—

> "[The law of nature] is the law which determines the conditions of perfect human co-existence, or *of progress towards the realisation of such co-existence.*"—(*Institutes of Law*, 2nd ed. p. 2.)

"1*st*. The laws of nature are logical, and as such necessary inferences, which it belongs to the scientific jurist to make from the facts which consciousness or internal observation, and experience or external observation, reveal to him as the necessary conditions of human life.

"2*d*. The laws of the nation, public and private, and the laws of nations, public and private, are similar inferences, which it belongs to the legislator or practical jurist to make; (*a*) from the laws of nature, which he accepts as facts; and (*b*) from the local and temporal facts or circumstances of the nation, or of the nations, which it is his business to ascertain.

"3*d*. Judicial sentences or judgments—*i.e.*, the laws of the individual case—are inferences equally necessary, which it belongs to the judge to make; (*a*) from the laws of the nation, or of the nations, which he accepts as facts in themselves, and consequently as decisive of the law of nature; and (*b*) from the facts—*i.e.*, the characteristics and circumstances of the individual—which it is his duty to ascertain."—(*Op. cit.* 250, 251.)

These statements bristle with difficulties. Is perfect human co-existence not a contradiction in terms, unless it includes all human imperfections?[1] What is progress *towards* perfection, and how far back may it commence? Then, apart from the inversion of the historical relation of the judge to the philosopher, we may ask what facts can the jurist, as distinguished from the historian, sociologist, or psychologist, discover, except the *forms* of legislation and judgment? Is the practical legislator bound always to obey the laws of nature? May he never allow exceptions "for the hardness of men's hearts"? If you say yes, you redefine the law of nature. Has the ordinary judge anything to do with the law of nature if he has a statute? Does he bring absolutely nothing to the judicial act? Is a judge so much of a machine that no consideration need be paid to anything but his legal qualifications?

But the special interest for us of these statements is that the law of nature is here defined as *purely and absolutely formal.* With the previous definitions which we have examined, it was a code of substantive law for actual life. Professor Lorimer's protest was mainly against haphazard

[1] *Cf.* James, *Varieties of Religious Experience*, 355.

sporadic legislation, and judicial decisions given from mere common sense. He would have had legislative specialists in Parliament, and judicial specialists on the bench, who had devoted special attention to law as a science, instead of picking up experience as apprentices and in the course of professional routine. This explains why he refuses to expound the law of nature through the details of positive law, as had been done by all Continental writers on this subject.—(Lorimer, *Inst.*, 2nd ed. 526.) If the *de facto* principle reduced all law to fact, and all rights were in some sense analogous to the "natural rights" in Scots law referred to below, then all that the lawyer had to do was to cultivate accuracy of observation and clearness of insight. When he was sure of his facts, the law followed "naturally."

We may now notice in conclusion the application of the term "natural" to what is really in effect positive law. As we have seen, equity was appealed to in British India in the last resort. The following article from the Austrian (German) Code affords an example of an appeal to natural right in the same circumstances. This law suggests three stages of difficulty in dealing with a particular case:—

> "If a case cannot be decided either from the words or from the natural construction (*natürlichen Sinne*) of a law, similar cases which are distinctly decided in the laws, and the motives of other laws allied to them, must be taken into consideration. Should the case still remain doubtful, it must be decided with regard to the carefully collected and well-considered circumstances, according to the natural principles of right (*nach den natürlichen Rechtsgrundsätzen.*)"—(General Civil Code for all the German hereditary provinces of the Austrian monarchy. Introduction. Of the Civil Laws in General, § 7.)

In Scots law the word "natural" is applied to rights such as servitudes, which suggest themselves by intuition to any ordinary man, or which are so intimately connected with the nature of things, that they cannot be conceived to be otherwise: (Ersk. *Inst.* ii. 9, 2; *cf.* Bell, *Prin.* 980, and Rankine on *Land Ownership*, 3rd ed. p. 340). Again it is applied to rights which follow logically from some legal institution,—*e.g.*, a

feudal grant (Ersk. *Inst.* ii. 3, 11; Bell, *Prin.* 861). In both of these cases "natural" is opposed to "conventional." Again in criminal text-books and judicial statistics we find "unnatural offences," and "cruel and unnatural treatment of children.." These phrases suggest the idea of *malum in se* as opposed to *malum prohibitum* (Holland, *Jur.* 35; p. 269, *supra*). This was the type of rights and laws to which Professor Lorimer, in so far as his theory touched the substance, proposed to reduce all rights and laws whatever. But as men do not know everything by intuition, but by process of reasoning and deduction, the theory does not explain the ordinary mode whereby men reach a knowledge of rights and laws.

And finally we may regard the scientific use of the phrase "natural law" as partly due to this last usage. The scientific use does not primarily deal with human laws and human relations, but is a statement of fact with regard to the conduct of objective things themselves. As water is *bound* to flow down a hill, the lower tenement is *bound* to receive the water from the upper, and the proprietor of the lower tenement is *bound* to abstain from interfering with the natural drainage.—(Pearson, *Grammar of Science*, 2nd ed., pp. 87-88.) The scientific law is an induction from observed facts, not much unlike the jural laws of servitudes and certain relations of property and person.[1]—(P. 320, note 1, *supra*.)

We may compare the various uses of the phrase "natural law" to the analysis of light by a prism. Here we have three orders of rays—(1) heat rays; (2) light rays from dark red, in infinite variety to the faintest violet, seven or three in number as you choose to count them, or infinite if you cannot count them; and (3) invisible chemical rays which produce wonderful visible effects. So at the one end we have the natural laws (statements of fact from our point of view as

[1] *Cf.* p. 394, *supra*, as to the theological associations with the phrase. Hooker (*Works*, i. 211) deals with natural things as "sociable parts united into one body," and subject to law *inter se*.

observers) as to natural things; similar laws of conduct (similarly formulated) of living things; then human laws, which supply the metaphorical starting-point for all the other uses. These are first judicial—between individuals; legislative—between groups; and philosophical, equitable, or moral—between larger groups and races of men. Then we have higher moral and equitable rules, which ultimately fade away into philosophy, poetry, religion. But it is the philosopher, with his analysis, who distinguishes these elements. To the ordinary common-sense man they are all blended in the unity of experience.[1]

SECT. X.—*MOS*—MORALS—MORALITY.

"Mos," it has been suggested (Lewis and Short, *s.v.*), is connected with a root *ma*, which means a rule or measure.[2] The Greek ἦθος, to which it corresponds, means originally the haunts of animals. In classical usage they both mean custom in a higher and special sense, and they are all connected by Julian in the text—

> "Inveterata consuetudo *pro lege* non immerito custoditur, et hoc est jus quod dicitur moribus constitutum."—L. 32, D. *de legibus* (1, 3).

Gaius (i. 1 and 92) links *leges* and *mores* as being similar. "Mores" is used by Ulpian (vi. 9-12) to signify bad morals—immorality. The phrase *boni mores* often occurs, but *mores* by itself means generally good morals—the approved standard of conduct.—(*Cf.* Ulpian, i. 4.)

Mos was with the Romans a kind of law, when they instituted the *censores morum*, who judged men according to a certain standard, The law became written and statutory when the censors published their edict (Bruns, 215) in which they condemned games and Latin rhetoricians:—

> "Hæc nova quæ præter consuetudinem ac morem majorum fiunt, neque placent neque recta videntur."

[1] *Cf* pp. 171 and 178, *supra*, with SirF. . Stephen's examination of the meaning of "ought" and "should" in *Liberty, Equality, Fraternity*, 2nd ed. p. 363. He seems to reverse the natural order of development.

[2] *Cf.* Renouf, *Hibbert Lectures*, 71, 119; and p. 37, *supra*.

Muirhead points out that the function of this jurisdiction of the censors was twofold, "for sometimes it operated in restraint of law by condemning—though it could not prevent—the ruthless and unnecessary exercise of legal right, as, for example, that of the head of a house over his dependants; and sometimes it operated supplementarily, by requiring observance of duties that could not be enforced by any compulsitor of law."—(*Roman Law*, § 8; Smith, *Dict. Antiq.*, *s.v.* "Censor"; Von Ihering, *Geist*, ii. § 26 (30).) *Mos* was thus related to the Roman law in very much the same way as equity, both in Rome and Great Britain.

The history of philosophy affords abundant examples of the criticism of law and political institutions by comparison with ancient customs. The pessimism of Hesiod in *The Works and Days* was an early example; Ovid's description of the golden age has already been quoted (p. 46, *supra*; *cf.* Spenser, p. 392, *supra*). The ancient customs may have been mistaken or imaginary, but they were considered the most effective means of criticism. The speech put by Sallust in the mouth of Cato the younger is an attack on the age in comparison with the past.—(*Catiline*, chap. 52.)

If the story told of Hipparchus is true (Grant, *Aristotle*, i. 82), "that he set up obelisks along the streets and roads carved with sentences of wisdom," we may see an attempt to make the popular traditional morality into a kind of statute law.

The great Jewish reformation in the time of Josiah (2 Kings xxiii.) was a reversal of innovations and a restoration of customs sanctioned with the authority of Moses.

English history is a periodical comparison of the laws, rights, and liberties of the subject with the early customs or the Great Charter, which formulated these customs in an authoritative form.

But there always comes a time when men criticise the past, and do not accept it blindly. No doubt they cannot escape from its influence, as they cannot free themselves

from their environment. But if they come to think that man has progressed from barbarism to civilisation and to a higher morality, the ideal will be put in the future rather than the past. Morality will mean not merely ancient customs, but customs which man hopes to attain, it may be, in an ideal state of existence. *Mos* becomes *æquitas—ratio*—the goal of life. This was the position of Plato and Aristotle. To them politics, ethics, and jurisprudence are still one science, the two first being branches of social philosophy and the last being not yet expressly named.—(Zeller, *Aristotle* (trans.), ii. 136; Grant, i. 73; Holland, *Jur.* (9th ed.), 24.) The individualism of Aristotle prepared the way for a science of rights—jurisprudence. Custom—the traditional morality—is still in the back-ground, and is often expressly recognised.—(Grant, *Aristotle*, i. 80; *cf.* Plato, *Laws*, vii. 800.)

The Stoics finally separated ethics from politics, and though they appealed to the customs of their austere forefathers, it was rather by the fiction of the law of nature and equity that they influenced the Roman law. The separation of ethics from politics arises when the distinction is clearly drawn between the state and the individual. The law of the state had attacked and dissolved the family law—the relations of the *paterfamilias* to his *familia*; a man's house was no longer a castle. It had also attacked and dissolved commercial law — the customs of traders. Then liberty is pushed back to its last stronghold—the bosom of the individual. Law has often attacked this, but always without success. Here we have a science of ethics, separated from politics and jurisprudence. But the individual is not satisfied with liberty in the sense of being let alone; by a natural impulse he goes on to demand that other persons shall adopt his ideal of individual rights, and hence Stoic morality came to react on the Roman law. As we have already seen, the negative idea of liberty becomes later a demand for positive liberty of aggression. John Stuart Mill (*On Liberty*) feels aggrieved because his liberty of printing,

publishing, and preaching his philosophy is met by a similar liberty claimed by ignorant persons of throwing rotten eggs at the preacher. Morality in this aggressive sense becomes a religion—a church militant like Mohammedanism and missionary Christianity. In crusades against intemperance, betting, and other practices, we have another example of negative liberty assuming a positive character, and sometimes morality being confused with religion. This morality is no longer a possession of the individual, but a social force.

In the Schoolmen morality appears as a quality of acts, good or bad. From the nature of the questions discussed as well as the solutions given, it is evidently common sense or custom which is the back-ground of much of the discussion by St. Thomas Aquinas of the nature of virtue. This is modified by religious ideals. He distinguishes ἔθος from ἦθος (Summa 1, 2, *q.* 58, 1.) by describing the former as mere usage, the latter as a natural inclination—a moral virtue. But the most extraordinary development of law in application to morals is the institution of the confessional and the rise of casuistry in the Roman Catholic Church. The office of the priest is spoken of as jurisdiction, and the Council of Trent pronounced an anathema against any one who should affirm that the sacramental absolution of the priest was not a judicial act.—(Scavini, iii. p. 335). The penitential forum, says St. Thomas, is more worthy than the contentious forum. Suarez (*De Leg.* viii. 6, 13) distinguishes the forum of conscience and the forum of penitence. Like the Roman censor, the priest is a judge; his code is not the censor's edict, but the Decalogue, the traditional morality of the Church, and the jurisprudence of casuistry. In practice persons of lax religious principles are said to evade this system, and satisfy their own consciences, by means of legal fictions, *e.g.*, crossing from France to Belgium, and confessing before strange priests, or paying a stranger a small fee to make a confession in name of the person paying. The attempt to identify

morality with law is just as likely to have as its result the lowering of men's ideals as the raising of their conduct.

In Northern Europe the Reformation swept away the whole system; but the legal framework of morality, which was part of the essence of Catholic theology, derived from St. Paul and St. Augustine, remained in the treatises of Protestant writers. Grotius *De Jure Belli et Pacis* was treated as a text-book of moral philosophy. It included a criticism of barbarous customs in war, and was so far an attempt to raise the customs of belligerents to a "moral" level. The criterion was found in Holy Scripture and in the writings of theologians, jurists, philosophers, and poets. Milton, in the *Samson Agonistes*, uses the phrase "law of nature and nations" as equivalent to "morality," though there is also a quasi-international reference:—

> "If aught against my life
> Thy country sought of thee, it sought unjustly,
> Against the law of nature, law of nations;
> No more thy country," &c.

Lord Stair, when Regent of Philosophy in Glasgow in the middle of the seventeenth century, might have read as his class lectures the opening sections of his *Institutions of the Law of Scotland*, to which particular reference will presently be made. Pufendorf—*parum jurisconsultus et minime philosophus*—in his book *De Jure Naturæ et Gentium* exemplified more strikingly that in his mind jurisprudence and moral philosophy were synonymous, unless jurisprudence is taken as meaning "positive law." It was his little work *De officio hominis et civis juxta legem naturalem*, annotated by Gerschom Carmichael, and published (2nd edition, Edinburgh, 1724) for the use of the students in Glasgow, which may be regarded as the foundation of Scottish moral philosophy. —(See Reid's *Works*, by Hamilton, i. 30, note.) The posthumous lectures on moral philosophy of Francis Hutcheson, Carmichael's successor in Glasgow, are for the most part an elementary treatise on jurisprudence and international law.

Adam Smith, the next professor, being free from clerical traditions, separated jurisprudence, ethics, and economics; but until the rise of the Neo-Kantian school the legal tradition influenced all the British schools of moral philosophy, both in order of arrangement and in substance. Even Hobbes is not an exception, though he was almost as anti-juridical as he was anticlerical, and deliberately took an independent position for himself (p. 396, *supra*). The modern treatment of customs, whether it be historical or metaphysical, does not appeal to them as customs, but judges them by some other criterion. It should be noted that on the Continent the successors of Grotius and Pufendorf treated the subject as natural law, or the philosophy of law, covering nearly but not quite the same ground as British mora philosophy, but dealing with substantive rights rather than duties (p. 395, *supra*). In Edinburgh University at one time the professorship of the law of nature and nations was regarded as a step towards the richer chair of moral philosophy.

It may also be noted that it is an English development to discuss the external forms of law under the name of jurisprudence. These forms are the result of custom, and may be criticised and amended in the same way as the substance of the law. This was the great work of Bentham, who saw that forms, adopted through mere superstition, work substantive injustice.

But in ordinary legal practice law and morality come into contact. Thus customs are not legal, and will not be recognised, unless they are "reasonable." This sets up an external standard, but "is not always to be understood of every unlearned man's reason, but of the artificial and legal reason warranted by authority of law."—(Browne, *Usages and Customs*, p. 19.) Contracts are invalid if *contra bonos mores*—*i.e.*, inconsistent with ordinary popular morality (Bell, *Prin.* 35; and cases in English Digests, *s.vv.*; "Contract," "Immorality;" Code Civil, Art. 1133). Foreign laws and rights acquired abroad are not recognised in other countries if they

are inconsistent with morality.—(Dicey, *Conflict of Laws*, 34; *Das Bürg. Gesetzbuch*; Einführ. G., Art. 30.) For all these purposes the Court must make up its mind on a point of morality as it does on a point of law; and when law and morality conflict, morality prevails.

Finally "moral" is used by some writers in the sense of "juristic," when they speak of "moral persons" (Pufendorf, *De J. N. et G.* i. 1, 12)—*i.e.*, persons holding certain offices, or corporations or states. Pufendorf had no objection even to the phrase "moral things."—(*Ib.* 16.) This usage still survives in the Italian Civil Code (§ 2), which speaks of "corpi morali," but it was condemned by Savigny (Rattigan, *Jural Relations*, 179). It may be suggested that a "moral person" meant merely a lawful corporation recognised by the law, as opposed to unlawful and prohibited societies.

So little is this last use of the word "moral" known in Britain, that when translated from Dutch into English it was treated as a matter of jest. In the Despatch dated February 16, 1897, Dr. Leyds, on behalf of the late South African Republic, claimed damages from Great Britain for the Jameson Raid, and divided his claim into two heads:—

> "(*a.*) Materieele schade.
> (*b.*) *Moreele* of Intellectueele schade."

This meant real damage, which could not be measured exactly in money,—*solatium* in Scots Law.—(Blue Book, "South African Republic," June 1899 [*cd.* 9343], p. 3.)

Morality is shown in external acts and by persons, and so in England it comes to mean, as it did in Rome, a special kind of law, enforced by special courts. Thus Sir J. F. Stephen:—

> "*Ecclesiastical Censures for Immorality.*
>
> "Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law) is liable upon conviction thereof in an ecclesiastical court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the court pronouncing the sentence of excommunication may direct."—(*Dig. Crim. Law*, p. 189.)

The word "morality" is so used in the indictment in the case of *Reg.* v. *Most*, 1881, 7 Q.B.D. 244. We may compare with this the title of the "*Immoral* Traffic (Scotland) Act, 1902," and the list of crimes given in the English Judicial Statistics.

Thus the civil courts deal with flagrant immorality where it becomes crime; the ecclesiastical courts deal with sins in deed or in word, and have even tried to extend their jurisdiction to thoughts in the *forum* of the confessional (p. 410, *supra*). It is interesting to compare the lists of crimes in criminal law books with the corresponding list of sins in treatises on the Canon law.—(Reichel, vol. ii.; Walter Steuart, Cook, Moncreiff, &c.) A man who lives so as not to come within the jurisdiction of the ecclesiastical courts is technically a moral man. From a higher standpoint he may be a contemptible scoundrel. It depends on the plane of custom or morality to which we refer.

The Westminster Confession of Faith (chapter xix.) deals with the law of God, or the moral law, which is "summarily comprehended in the Ten Commandments."—(Shorter Catechism, 41.) This law is, however, not precisely the same as the Canon law administered by the Presbyterian Churches. It is so to speak extrajudicial for the benefit of the private individual. It is wider and includes morality, which even spiritual courts cannot and do not attempt to reach—*e.g.*, the ethics of creed subscription. The Presbyterian Churches recognise liberty of conscience to this extent, that they will only prosecute persons who offend in word or in deed.

Moralities, like legal systems, are local or peculiar to particular groups of men, and collisions of moralities must be solved, as collisions of rights, duties, or laws. Foreign morality may be criticised. The collision between two moralities may be solved by physical force—in reality law—or by the superior intellectual force of the men who embrace a particular creed; or again by men inferior in position or intellect admiring or imitating the morals of their superiors

in either of those respects. Hence the power of religion. It is morality enforced with zeal, as well as touched with emotion. Hence the intolerance of religious men, varying from active persecution down to social ostracism or dislike.

In India, where the Government refuses to recognise any positive religion, it has been suggested that it should supplement the penal code by instruction in morals. A Commission in 1884 recommended "that an attempt be made to prepare a moral text-book, based on the fundamental principles of natural religion, such as may be taught in all Government and non-Government colleges."[1] The "morality" that such a commission would have adopted would evidently have been at bottom what is commonly called Christian, though its main features are found in the writings of Greek, Chinese, and Indian philosophers.

All the ideas which we have noticed hitherto as involved in law seem to be identified by Lord Stair in his *Institutions of the Law of Scotland.* This great work was published in its present form in 1693, when the Roman law was in a sense still the common law in Scotland, and when Scottish lawyers were educated in Holland, and held by the traditions of the Dutch civilians. In the opening title he says :—

"I. Law is the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof. . . . This is that eternal law which cannot be altered, being founded upon an unchangeable ground—the congruity to the nature of God, angels, and men. . . . This is also called the law of nature, because it arises from the congruity or conveniency of nature, and thence is known by the light of nature. . . . II. Correspondent to those dictates of reason (wherein law consists), which are in the understanding, there is an inclination in the will to observe and follow these dictates, which is justice. . . . III. Divine law is that mainly which is written in man's heart, according to that of the Apostle. . . . This is the law of nature, known naturally either [or] immediately, like unto those instincts which are in the other creatures, whereby they know what is necessary for their preservation. So the first principles of this natural law are known to men without reasoning or experience, without art, industry, or education, and so are known to men everywhere through the world,

[1] Lyall's *Asiatic Studies* (2nd ser.), p. 8, where the whole subject is discussed.

though they keep no communion nor intercourse together ; which is an unanswerable demonstration of the being of this law of nature. . . . IV. With these common principles, with which God hath sent men into the world, He gave them also reason, that thence they might by consequence deduce His law in more particular cases ; and this part of the natural law is called the light or law of reason. . . . V. This law is also called conscience . . . Conscience relates more to the principles of religion than of morality. . . . VI. This law of nature is also called equity from that equality which it keeps amongst all persons. . . . VII. The law of nature is also termed the moral law, being the absolute and adequate rule of the manners of men for all times, places, and persons." [XV. Human laws and positive laws are enacted for the purpose of declaring and making clear the law of nature and reason, and for the settlement of arbitrary points, to prevent disputes.]

"Hence it appears how necessary the laws of men are. Yet surely they are most happy whose laws are nearest to equity and most declaratory of it, and least altering of the effects thereof, except in cases eminently profitable."

But in the dedication to the King (Charles II.) and throughout the title just quoted, he puts the Word of God either before or alongside the law of nature. He says expressly :—

(VII.) "The law of nature, as it is imprest upon our hearts, so in the goodness of God it is exprest in His Word . . . because through sin and evil custom the natural law in man's heart was much defaced, disordered, and erroneously deduced : he hath therefore reprinted the law of nature in a viver character in the Scripture, not only having the moral principles, but many conclusions thence flowing, particularly set forth. This analogy of the law of nature, even in the hearts of heathens, and as it is set down in the law of God, evidenceth sufficiently that both of them proceed from the same omniscient Author."

But this suggests the next head.

SECT. XI.—RELIGION—*FAS.*[1]

The appeal to the supernatural is coeval with the very birth of law. But though law and religion are still intimately connected, the relations between them have undergone

[1] On this subject and that of the preceding section see von Ihering, *Geist des röm. Rechtes*, i. s. 18 ; ii. ss. 26 and 55 ; De Meulenaere's Trans. i. p. 267 ; ii. p. 50 ; iii. p. 86, and iv. p. 220 ; Bryce, *Studies*, ii, 209. As to the meaning of the word religion, and as to the relation of religion to reason, reference may be made to Mr. W. H. Mallock's *Religion as a Credible Doctrine:* London, 1903, pp. 7, 10, &c.

a revolution in the course of their history. As the beginnings of law in the technical sense are judicial, so the first appearance of religion in connection with law is in the legal process, unless we except such a case as the killing of a person found in the act of sacrilege. In the common legal process the culprit was taken in the act or confessed his guilt, and no legal skill was necessary. But if the law or the facts were obscure, divine assistance, it might be of the god against whom the offence had been committed, might be invoked. Hence also the use of torture to extort confession.

As we have already observed (p. 236), the "leading cases" reported by antiquity,—problems which required divine assistance for their solution—appear to us childishly simple. The judgment of Solomon in the competition for a child between two women of the harem;[1] the judgment of Solomon when a boy of eleven, in which he gave to the owner of a field the produce of sheep which had trespassed until the field was restored to its former state (referred to in the Qu'rân, Palmer's trans. ii. 52); the story of Daniel, Susannah and the Elders; the story of Shylock and the Merchant of Venice, are all simple cases. The points raised before Sancho Panza, as Governor of Barataria, were rather logical than legal puzzles, and others are arithmetical or geometrical.

In early times Church and State—law and religion—are identical. And the first idea is that every single legal judgment is an inspiration of the gods. The judge was an oracle. This is seen most clearly in the Jewish Scriptures. The Hebrews came to Moses to inquire of God. "These are the judgments which thou shalt set before them." "The Urim and the Thummim" and the breastplate of judgment were a means of divination (Exodus xxviii. 30). The Septuagint translates the passage thus:—"Καὶ ἐπιθήσεις ἐπὶ τὸ λογεῖον τῆς κρίσεως τὴν δήλωσιν καὶ τὴν ἀλήθειαν," and the Latin Vulgate, "Pones autem in rationali judicii Doctrinam et Veritatem."—(See Hastings' *Dict. of Bible*; and Smith's *Dict. of*

[1] *Cf.* the similar decision of Sir Artegall in Spenser's *Faerie Queene*, bk. V. canto i., with Max Müller, *Last Essays*, i. 279.

Bible, s.v., "Urim and Thummim.") Another example is "the law of jealousy," expounded in Numbers v. 11-31. If the draught there prescribed had any potency, it could only be by frightening the woman into confession.

The "lot" was a means of ascertaining the divine will, though now devoted to profane purposes. So Grotius recommends the "lot" as a means of settling disputes and preventing war, quoting in support of his suggestion Dio Chrysostom and Solomon, the latter of whom says—"The lot causeth contentions to cease, and parteth between the mighty."—(*De J. B. et P.* ii. 23, 9.)

Babylonian conveyancing was a skilful adaptation of witchcraft, as we see from their boundary stones; another example of the same is the Egyptian Cippus of Horus.—(Metternich-stele; Budge, *Egyptian Magic*, 147.)

Spells are also used for the detection of crime, as in the Hebrew example just given. It is not so long since in our own country it was the belief that if a murderer touched the body of his victim it would bleed—supernatural evidence of guilt.

The whole rational principle of the duel was that God would defend the right.

This was the purpose of ordeals, and the original purpose of oaths. It was assumed that God, like an Oriental potentate,[1] would execute on the spot the man who broke his oath or swore falsely.—(Laws of Manu, viii. 109; Bryce, *Studies*, ii. 212.) We see this vividly in the following stanza of Chaucer:—

> "A Briton book, writen with Evangyles,
> Was fet, and on this book he swoor anoon
> She gilty was, and in the mene whyles
> A hand him smoot upon the nekke-boon,
> That doun he fil atones as a stoon,
> And bothe his yën broste out of his face
> In sight of every body in that place."
>
> (*The Tale of the Man of Law*, 666-672.)

[1] See the account of the execution of the murderer of Dr. Cooper at Fez, by the Sultan of Morocco.—*Times*, Nov. 14, 1902, p. 6. *Cf.* Fisher, *Social Germany in Luther's Time*, pp. 53-59.

It may be a survival of the era of spells and witchcraft that demands particular words in legal writs—*arbores* for *vites*, "dispone," "decern," &c. &c.—(Budge, *op. cit.* 4, 129, pp. 227, 293, *supra.*)

The Latin *fas* suggests association with the oracle, if it is derived from the same root as fari, *φημί*. Von Ihering[1] says that etymologically it signifies what appears light, a Divine revelation, Divine oracle, such as *fatum.*

Jus, Mos, and *Fas* were different aspects of law, and were practically synonymous in later usage. Gellius has preserved for us an interesting passage, where all these words occur, in giving an account of the Flamen Dialis, but the variety of expression appears to be purely literary. As a rule the custom is stated *as a fact* (thirteen cases); *religio* occurs three times; *fas,* four times; *jus,* twice; *mos,* once; and other expressions five times. The following are specimens:—

"Equo Dialem flaminem vehi *religio* est . . . item jurare Dialem *fas* nunquam est . . . ignem e flaminia id est flaminis Dialis domo nisi sacrum efferri *jus* non est. vinctum, si ædes ejus introierit, solvi *necessum est* et vincula per impuviun in tegulas subduci atque inde foras in viam demitti. . . . Capillum Dialis, nisi qui liber homo est, *non detondet;* capram et carnem incoctam et hederam et fabam neque tangere Diali *mos* est neque nominare. . . . pedes lecti, in quo cubat luto tenui circumlitos esse *oportet,* . . . sine apice sub divo esse *licitum non est,* &c.—(Huschke, *Jur. antejust.* 3; Muirhead, *Roman Law,* pp. 15-18.)

Isidore (*Decr. Grat.* Pt. I., Dist. 1, ch. 1, § 1) says—"Fas lex divina est; jus lex humana; transire per agrum alienum fas est, jus non est." The Divine law is unchangeable, and is opposed to human laws, which arise from custom, and vary locally and temporarily.

The legal associations of *fas* are evident from the passages in Gellius as to the *jus pontificium,* and also in the distinction of *dies fasti* and *nefasti*—court days and non-court days, which were kept a sacred secret till divulged by Cneius Flavius.[2]

[1] *Geist des r.R.,* book i. s. 18; De Meulenaere's *Trans.*, i. 268.

[2] There was a similar distinction in the Egyptian Calendar,—Budge, *Egyptian Magic,* 225.

The *actio sacramenti* was another point where legal action and religious ceremony came into contact. If the decision was not supernatural, the enforcement of the decree partook of that nature.—(Muirhead, 5, 188, &c.)

But when Greek philosophy began to despise omens, spells, witchcraft, and lots, and to regard the universe as divine in a higher spiritual sense, the doctrine of the divine origin of law took a higher form. The jurists might regard themselves as priests and guardians of the sacred mysteries. This idea, formulated by Ulpian, is put among the very first sentences of the Pandects. It had been expressed by Cicero in the famous passage in his *Republic* (iii. 22), preserved for us by Lactantius and quoted by Pufendorf (ii. 3, 20):—

"Est quidem vera lex *recta ratio naturæ congruens*, diffusa in omnes, constans, sempiterna, quæ vocet *ad officium jubendo*, *vetando a fraude* deterreat: quæ tamen neque probos frustra jubet aut vetat nec improbos jubendo aut vetando movet. Huic legi *nec* obrogari *fas* est *neque* derogari ex hac aliquid *licet neque* tota abrogari *potest*, *nec* vero aut per senatum aut per populum *solvi hac lege possumus*, neque est quærendus explanator aut interpres ejus alius, nec erit alia Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium *deus*, ille legis hujus *inventor*, *disceptator*, *lator*: cui qui non parebit, ipse se fugiet ac *naturam hominis* aspernatus hoc ipso luet maximas pœnas, etiamsi cetera supplicia, quæ putantur, effugerit."

The Latin *religio* has legal associations. If derived from *legere*, as Cicero thinks, it may refer to the reading and understanding of the signs of the oracle; if from *ligare*, as now commonly accepted, it is another form of *jus*, *obligatio*, and the ideas we have already examined. We have persons, things, and acts of a religious character. *Res religiosæ* were well recognised in the Roman law, and we may regard prayers and vows as *res incorporales*—prestations to deities or saints—as well as contracts.—(Ihering, *Geist des r. R.* i. § 18.)

Where Church and State are identified the law even in civil affairs may be regulated by religious considerations. Priests were a physical embodiment of both law and religion.

Thus, as we have seen, in the laws of Manu we have a revelation which, *inter alia*, gives a body of rules to guide the king in administering justice. Mercantile law is disposed of shortly by referring to custom. By enforcing their own rights and the rights of their deities, the priests, like the kings, created and enforced law. Thus religion in many ways has moulded and modified, if it has not actually originated, law and jurisprudence as well as art, architecture, sculpture, painting, music, and literature. We see the process going on before our eyes in the fight to retain education by the Church. In the Universities education has been almost entirely secularised, but elementary education is still a bone of contention between Churchmen of various creeds and secularists. But the system which Europe has abandoned is still to be found in Musulman countries. We may see students sitting cross-legged on the floor of Justinian's great church—the Mosque of St. Sophia—receiving instruction in theology and law from the same teacher.—(*Cf.* Bryce, *Studies*, ii. 221.) The Scottish Universities still actually confer degrees *in utroque jure*, though some persons assert that one of the laws is not the Canon Law.

The theology of the Catholic Church—including the Churches of the Reformation—is essentially a legal system. It has taken its form from the Roman law, as we may see by inspecting the *summa* of St. Thomas Aquinas and the Westminster Confession of Faith. St. Thomas in his great work has set himself to combine into an intellectual unity the Bible and the traditions of the Church, as contained in the writings of the Fathers, the *Ethics* and *Politics* of Aristotle, and the *Corpus Juris Civilis*, with his own experience and robust common sense. The whole treatise is on religion, like *The Laws of Manu* and the *Qu'rân*, but with him religion includes law, for incidentally he treats law and rights with great fulness of detail (1, 2, *qq.* 90-97, and 2, 2, *qq.* 57-79). As justice was ambiguous with Aristotle in a wider or a narrower sense, so *religio* may apply to the spiritual relation

of individuals to God or a particular state of a person who has taken vows (2, 2, *qq.* 81-100, 184-189). "A man of religion" was merely a person who had taken vows, as we see in Chaucer's *Prologue*.—(Reichel, ii. 80.)

As the Church is above the State, so is the Divine law above the human. St. Thomas followed Isidore and the Canon law in maintaining that laws must be honest and just (p. 356, *supra*). He quotes (1, 2, *q.* 95, 2) St. Augustine as an authority for the view that a law which is not just is no law, and adds, "Si vero in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio."

Suarez (ii. 14) discusses whether human laws may dispense from the law of Nature, and favours the negative. In another passage he lays it down that human law must be conform to the Divine (ii. 4, §§ 5 and 8), and that it derives its force from participating in the principles of eternal law. Again he deals with the evasion of unjust taxes (v. 18, §§ 12-13), but it must be the Church which is the ultimate judge of justness.[1] There is a presumption in favour of the civil power which is delegated to the ruler by God: "By me kings reign and princes decree justice."—(Prov. viii. 15, quoted by Suarez, ii. 4, 5.)

The modern doctrine, laid down by Scavini, is that civil powers can deal only "*circa res mere civiles*: non enim possunt condere leges ecclesiasticas."—(i. 182). But it is the Church which must decide on the question of jurisdiction.

What is Catholic theology but another form of custom? The truth is what the Church has handed down by immemorial tradition—*Quod semper, quod ubique, et ab omnibus.* The answer of the Reformers was that they went back to an earlier custom—that of the Primitive Church. But now since the promulgation of the doctrine of Papal infallibility, it may be said that custom has given way to legislation. The Pope is the authoritative interpreter of custom and he "can do no wrong."

[1] When churches become political they find great difficulty in giving "to Cæsar the things that are Cæsar's."

The Reformation raised new difficulties as to the relations of Church and State—law and religion, and we may now observe how these were met. The Westminster Confession of Faith (chapter xxiii.), which is the written creed of the principal Scottish churches, lays it down as the duty of the civil magistrate to assist the Church in maintaining the truth and suppressing heresy and disorder, and provides,—"It is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their *lawful* commands, and to be subject to their authority for conscience sake. Infidelity or difference in religion doth not make void the magistrates' *just* and *legal* authority nor free the people from their due obedience to him, *from which ecclesiastical persons are not exempted.*" These clauses have presented great difficulties in application in Scottish ecclesiastical politics.

Grotius, whom we may well regard as a rational Schoolman, starts with the idea of the social nature of man as the foundation of law, but he goes on to show that God is the Author of this nature (*De J. B. et P.*, Proleg. 11, 12), and says,—"Here we are brought to another source of right (*jus*) besides the natural source, namely, the free will of God, to which, as our reason (*intellectus*) irresistibly tells us, we are bound to submit ourselves." Of this *jus voluntarium divinum* (i. 1, 15) he says,—"It may be said, but with reserve, that God did not command the act because it was just, but that it was just because God commanded it." Three times in human history has there been this revelation of law to all mankind:—First, at the Creation to Adam; secondly, to Noah after the Deluge; and thirdly, through Christ. "Tria hæc jura haud dubie omnes homines obligant." In a subsequent passage (i. 1, 17, 3) he applies this to practical legislation by declaring "that it is not now lawful for the rulers of Christian states to make laws of the same purport as the laws of Moses."

Pufendorf (*De J. N. et G.*, ii. 3, 20) states explicitly,—"To make these dictates of reason obtain the power and dignity

of laws it is necessary to call in a much higher principle to our assistance." . . . "The obligation of natural law proceeds from God himself, the great Creator and supreme Governor of mankind, who, by virtue of His sovereignty, hath bound men to the observation of it." He rejects the view of Hobbes (*De Cive*, c. 3) that "those laws which we call natural . . . are not laws as they proceed from nature, but only as they are enacted by God in Scripture." His reason is that it is not "essential to a law that it be conveyed to the subjects' notice in the form and manner of a proposition."

Hobbes himself says—

"The same law which is *natural* and *moral* is also wont to be called *divine*, not undeservedly, as well because reason, which is the law of nature, is given by God to every man for the rule of his actions, as because the precepts of living, which are thence derived, are the same with those which have been delivered from the Divine Majesty for the *laws* of his heavenly kingdom by our Lord Jesus Christ and his holy prophets and apostles. What, therefore, by reasoning we have understood above concerning the law of nature we will endeavour to confirm the same . . . by holy writ."—(Molesworth's ed. ii. 50; (Latin) ii. 199.)

"The *commands* of the rulers are the *laws* of the ruled . . . God's *laws* are declared after a threefold manner—first, *by the tacit dictates of right reason;* next by *immediate revelation*, which is supposed to be done either by a supernatural voice, or by a vision or dream or divine inspiration; thirdly, by the *voice of one man* whom God recommends to the rest as worthy of belief by the working of true miracles. Now he whose voice God thus makes use of to signify His will unto others is called a *prophet*."—(ii. 205.)

This appears to be exactly the doctrine of Lorimer (*Institutes*, 2nd ed. p. 35) on account of which he complains (p. 21, note) that he was classed with the theological school. Hobbes thus expressly justifies the identification of natural law, equity, the moral law, and the divine law with reason and reasonableness.

Reference might again be made to the views of Lord Stair (p. 415, *supra*). His position was the traditional one, derived from the Greek philosophers, Cicero, and the Roman lawyers through the Fathers of the Church and the Schoolmen. Natural law and morality are Divine law.

Dallas of St. Martin, whose Styles were published after upwards of thirty years' use in 1697, shows how Stair's doctrine was applied in Scottish practice. In the inductive clause of a revocation he says—

"Considering how I have been imposed upon . . . to disinherit my said daughter and grandchild of their just, lawful, and righteous inheritance, to which by the *laws of nature*, municipal laws of the land, and even *religion itself*, they ought in justice to succeed."—(Stiles, ii. 485; *cf.* "Disposition" 486.)

Coming down to modern writers, we find Blackstone (iv. 59) declaring with Chief-Justice Provost that "Christianity is part of the laws of England," and thence offences against God and religion come first. But in an earlier passage (i. 39) he lays it down that man depends on his Maker, and—

"He should in all points conform to his Maker's will. This will of his Maker is called the law of nature . . . when [God] created man and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws." "Our own self-love" is "the universal principle of action." He "has graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own true and substantial happiness.' This is the foundation of what we call ethics or natural law. . . . This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

[Divine providence] "hath been pleased at sundry times and in divers manners to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or Divine law, and they are found only in the Holy Scriptures. These precepts when revealed are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity . . . Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself. The other is only what, by the assistance of human reason, we imagine to be that law. . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws—that is to say, no human laws should be suffered to contradict these."

John Erskine, of Carnock, Professor of Scots Law in Edinburgh, lays down the same doctrine as Stair, but with less elaboration (*Inst.* i. 1, 3)—

"All laws ought to be in themselves just. This character is inseparable from the laws of God, who is justice itself; and human laws, when they prescribe anything repugnant to natural justice, have no coercive force." "The law of nature has the God of nature for its author, and it is not made known to us by any formal or external notification of His will, but is impressed on our minds by the internal suggestion of reason, and is therefore elegantly said by St. Paul to be written by God upon the heart of every one of us."—(§ 7.) "What the law of nature has commanded cannot be forbidden or even dispensed with by positive law, and in like manner what it prohibits cannot be commanded or even permitted by human authority. The law of nature being indeed the command of God, to whom all His creatures owe absolute obedience, no earthly lawgiver, who is himself subject to that law, hath a right of abrogating or controlling it."—(§ 20.)

It is evident from section 26 that Erskine regarded revelation as dealing only with Jewish law. If these laws are binding on us now, it is because they are in accordance with the higher natural law. Erskine thus traces natural law to God, but does not find it in Scripture (*Prin.* i. 1, 2). He retains the theological formula, but the three revelations of Grotius appear only as a rational inference from the fact of original creation. But the doctrines of Blackstone and the still milder doctrine of Erskine are rejected by their later editors, who regard them as a mere survival without any organic connection with their subsequent expositions of the law. From notes added by Professor Christian to the passage quoted from Blackstone and by Lord Ivory to those from Erskine, we see that practically the law courts must be the judges of what is the law of God or the law of nature.

Coke gives an example of "the law of God, *Vindicta est mihi, et ego retribuam,*" which prohibited private revenge.—(*Inst.* 2, 103.)

The chief rules in our law, borrowed directly from the Bible, are the list of degrees within which marriage is forbidden.[1] Many accept the rules who would dispute the

[1] Ersk. *Inst.* i. 6, 9; *cf.* 37; and Purves' Trs. *v.* Purves, 1895, 22 R. 513.

doctrine that they were binding solely because they were a Divine revelation. Another rule, which is traced to the Hebrew Code in Exodus, is as to the liability for an animal which has been in the habit of doing damage. But this rule is adopted not because it was revealed, but because it is rational, and therefore natural and customary. Authority is found in revelation for many diverse laws of marriage and divorce. Mohammedans find authority for having four wives in the example of Jacob, and for a very simple form of divorce. Christians are monogamous as a general rule; some Christians hold marriage to be indissoluble and refuse divorce. Scots law quotes Scripture for divorce on the ground of desertion (*Confession of Faith*, xxiv. 6).

The logical outcome of Blackstone's doctrine may be seen in the caricature of it by the early settlers in the New England States. They carried the laws of England with them, and Blackstone's doctrine in so crude a form that they incorporated chapters of the Jewish Scriptures in their published statutes, as being the law of God. De Tocqueville has pointed out the grossly iniquitous results—intolerance persecution, and tyranny.—(*Democracy in America*, Reeve's trans. (1889) i. 34; 2 Kent, *Comm.* 34. *Cf.* Bryce, *American Commonwealth*, c. 107.)

This wholesale verbal adoption of the divine law might do little harm in the time of Alfred the Great (Thorpe, 20 *et seq.*) because the machinery of enforcement was different, the civil courts more lax and inefficient, the church more powerful than in modern times, and above all, the state of society and public opinion more uniform. It was sheer force of circumstances—the fact that society was more than religion—that religion was made for man, and not man for religion—which has produced toleration, freedom, and religious liberty both in Britain and America.

The change of view sketched above as to the relation of religion to law has affected the relations of Church and State, and the conduct of the individual members of these bodies.

When congresses of clergy and presbyteries press legal reforms on the Government it is only as citizens. They more often appeal to utilitarian reasons than to the revealed law of God. Even members of the Catholic Church are compelled to adopt a similar attitude. When they demand what they think justice, they do not plead the law of God or of the Church as a title, so often as the fact that they are citizens, taxpayers, and ratepayers.

We see, then, what is said to be revealed:—

(1.) In the earliest stage the Deity deals with details of procedure, and reveals separate judgments on every case. This is still the Chinese view.[1]

(2.) As states become organised, and as the judicial function of administering law in accordance with custom, good faith and the observance of contracts becomes separated, the revelation takes the form of legislation—as with the Hebrews and the Hindus, who received codes in this way.[2]

(3.) As the conception of the relation of the Deity to the universe changes so does His relation to law. The legislation becomes more and more general. As the legislator lays down a general rule for the judge, so does God lay down a general rule for legislators. "Divine" law becomes "Eternal" law, which cannot change, as God is justice himself.

(4.) But laws regulate rights. If God reveals rules to settle collisions of rights, how were rights created? The Book of Genesis, and the theories of Grotius and others founded thereon, show that God gave man dominion over things and living creatures. He instituted the legal relations of property and marriage, parent and child, and inferentially all others, and the rights flowing therefrom. If we

[1] Lyall's *Asiatic Studies* (2nd ser.), 156.

[2] *Cf.* the Code of Khammurabi, Johns, p. ix.

know the rights which are Divine, the Divine reason in us may find the laws.

(5.) In like manner many moralists hold that what is revealed is duties—to God, to men, and to one's self.

(6.) The doctrine then dwindles down to that of Erskine, that God created the world and human beings. Rights are involved in human nature and laws are involved in rights; and thus they are all ultimately Divine.

Religions are also all local and temporal, and come like laws into collision. We must have some criterion for judging between them. Thus Mohammedan morality may regard Hindu morality as bad, and force may be required to settle the question. Missionary enterprise amongst the young, preaching crusades with the older generation, may set up a new order of ideals and prejudices, and supplant an older order of tradition, for law and religion agree in this, that custom and immemorial tradition are prominent in both, and that custom may be reformed by an appeal to ideals, either past or future. We see the collision between Christianity and Hinduism solved in India in all those ways.—(Mayne, *Hindu Law and Usage*, 4th ed. 52)—and we see the law reformed in New England and in Great Britain by an appeal from the Old Testament to the New; then to the Sermon on the Mount; or to the general spirit of Christianity, which means ultimately the civilised views of the present day; for many people cling to the name of Christian though they reject all the special doctrines which distinguish that religion from Greek or Roman or perhaps Indian or Chinese philosophy.

While religion thus becomes sublimated into the general idea to which humanity strives to attain in social relations, it has in law a definite meaning. We are not here concerned with religion as an institution, which looks for recognition and support from law and the State. This must be reserved

for future discussion. We may, however, note that if the State supports or suppresses religion, the laws it makes will have this end in view, and will be determined thereby, and in this sense will be utilitarian. One point, however, demands notice. The laws of England and of Scotland deal with offences against "religion," *i.e.*, the definite doctrines of the Churches established in those respective countries.—(Blackstone, Hume, Stephen's *Digest*, sects. 179-185.) These are similar to but different from offences against "morality."

In the Catholic Church the mediæval usage of the word "religio" still survives. The *status religiosus*, as we have already seen, is a mode of life in obedience to vows.—(Scavini, i. 466; Reichel, *Canon Law*, ii. 80.) The whole subject is legal, and gives rise to legal problems, *e.g.*, can a cleric become religious? His doing so may injure the Church; he may be barred, because he was educated for the priestly office, and so on.—(Scavini, i. 583.)

But although civilised modern law has been entirely secularised, we find churches borrowing from the reasonable justice of municipal law. This was so even in the Middle Ages, for the Canon law is founded on the Roman Civil law. This law was adopted in great part also by the Mohammedans, as they adopted Roman roads, and the Roman mode of administering taxation. In legal procedure the Church Courts in Scotland follow secular examples. Religion can no more draw up a code of laws than it can build a cathedral. The religious spirit no doubt affects both in substance and form, but just as the architect must make sound foundations and arches in accordance with statical laws, so the jurist, though he also be a monk, must, consciously or unconsciously, make his decrees or his code in accordance with the laws and the history, nature, and character of the men for whom he legislates. We must not forget that the same age which produced inspired judges and legislators produced also inspired architects and builders.—(Exodus xxxv. 31, &c.) The inspired jurist adopted utilitarian ends,

as the inspired architect adopted utilitarian stones and mortar to keep the rain off the worshippers.

Religion thus borrows forms from law, as law in its earliest stages borrowed from religion. It manifests itself in persons—priests and "religious persons,"—in things—*res sacræ* and *religiosæ*, temples, shrines, &c.; in acts—religious *services*, offices for the dead, prayers, sacrifices, &c. It is an art or a science. Primitive religion is often nothing more than the art of defeating or circumventing supernatural neighbours, and propitiating supernatural friends and allies. It becomes ultimately spiritual, like the divine impulse of Socrates; like habit with Aristotle; the spirit which Seneca demands in benefactors, or the goodwill, which Ulpian considered to be the essence of justice. To some the new spirit seems the negation of religion, as it seemed to the contemporaries of Socrates and of the Apostle Paul,[1] for the tendency of both law and religion is to become absolutely formal. On the other hand law—the law-abiding spirit, justice, equity—may become in very truth a religion.

SECT. XII.—FACTS AND IDEALS [2]—UTILITY.

Religion or supernatural revelation affords no criterion of the justness of laws or rights. We must judge of religions, as of all social institutions, by means of reason. The missionary to the heathen tries to show that his religion is more reasonable than that of the heathen; the interpreter of Scripture argues that his interpretation is more reasonable, or he founds on the principle that God wishes the life and happiness of his creatures to be as great and lengthened as possible. On the other hand, if we attempt to buttress justice with miracles or supernatural physical

[1] The title of M. Guyau's able work, "*The Non-Religion* (*L'irréligion*) of the Future," gives countenance to this idea.

[2] Krause, *The Ideal of Humanity* (translated by Prof. Hastie, D.D.).

force we build on a foundation of sand, for if the miracles are disbelieved, or the force is repelled by skill or greater force, the whole fabric falls to ruin. Rousseau (*Contr. Soc.* ii. 6) summed up the position of the present day when he said—"Toute justice vient de Dieu, lui seul en est la source; mais si nous savions la recevoir de si haut, nous n'aurions besoin ni de gouvernement ni de lois. Sans doute il est une justice universelle, émanée de la raison seule."

The gods no longer inhabit Olympus: the oracle of Delphi is dumb; the Temple on Zion Hill is no more. The discoveries of science have shown that the earth is an insignificant globe floating in space; and that its history, and the history of the men who inhabit it, have gone back for thousands if not millions of years. If we accept the theory of Erskine as to the law of nature, both the character and the date of the act of creation seem pushed out of our age, so far back that they have no near relation to modern needs and circumstances. What is the criterion of rights and laws? We now set ourselves first to ascertain the facts of nature; and secondly, by reason, to infer from these facts rights, duties, and laws. Lawyers divided their systems under three leading categories—persons, things, and actions—the external forms of rights and duties which inhere in persons with regard to things and persons, these rights and duties in turn being regulated by means of laws—remedies, actions, &c. The three precepts of the law appear to correspond to each point of view. *Honeste vivere* looks to laws and actions, *neminem lædere* to persons, and *suum cuique tribuere* to things.

Philosophy is a revolt against physical external supernaturalism. If the popular religion claims to be inspired, the philosopher claims to be inspired also. Socrates might not see the heavens open and hear God speak in thunder, but he knew the still small voice within him—the Δαιμόνιόν τι. This was perhaps a fiction, like the appeal to the code of the *jus naturale.* It expressed a truth in the current dialect. God was not to be found in portents, miracles, and magic,

but He was the reason of a rational universe, and was to be found by reason.

Plato and Aristotle treated of politics and the State, rather than relations of individuals, but the Stoics first gave us moral philosophy in the modern sense (Grant, *Aristotle*, i. 306). Cicero in his *De Officiis*, which is written on Stoic lines, deals at the very outset with *Honestas*, one of the elements of which is "*tribuere suum cuique*" (i. 5, 15). The man of honour (*Honestas*) needs no statutes and actions to compel him to do right; he is a law to himself. Although Horace was an Epicurean, the famous lines of his ode (iii. 3) breath a Stoical spirit:—

"Justum et tenacem propositi virum
Non civium ardor prava jubentium,
Non voltus instantis tyranni,
Mente quatit solida neque Auster,

Dux inquieti turbidus Hadriæ,
Nec fulminantis magna manus Jovis;
Si fractus illabatur orbis,
Impavidum ferient ruinæ."

Justice is not an external thing, but resides indestructible in the soul of the just man. The Kosmos might disappear in ruin; the gods might try to terrorise; the rabble with one accord might issue their command; but they cannot make justice. Justice is the still small voice in the bosom of the individual. He can defy witchcraft, for it cannot reach his soul.

The Roman law attempted to give a detailed answer to the question, What is *suum cuique?*

"Justinian's Pandects only make precise
What simply sparkled in men's eyes before."

The Roman law emphasised the rights of the individual, and thus the individualistic systems of philosophy—Epicureanism and particularly Stoicism—found a congenial soil in the Roman state. Politics was not open to discussion by the Roman citizen in the Empire; and the intellects which in

Greece might have discussed the nature of the State, turned their attention to the rights of individuals, and so formed a new conception of justice (*cf.* Cicero, *De Off.* i. 7, 21.). Seneca's work *De Beneficiis* may be read as a treatise on morals from a legal standpoint—the *jus humanum* instead of the *jus civile*—the things and prestations with which it deals being benefits.

Christianity gave a new meaning to the law of nature by raising the higher nature of man, but it absorbed Pagan elements till it in turn became a new heathenism. The saints took the place of the local deities; the sacraments and formalism were mere magic revived. The Reformation on its intellectual side was a protest not much unlike that of the early Greek philosophers.

The rise of Christianity, and its spread over the Empire, gave a new direction to the idea of the individual and of personality. Justice was demanded by all humanity, and at the present moment men are face to face with problems between men of different races, and between men fighting in commerce and on the battlefield, where justice is the object sought for—problems which baffle at once the sagacity of the politician, the ingenuity of the philosopher, and the aspirations of the philanthropist.

The successors of the Reformers still sought for a law of nature outside of the supernatural, and found it in the doctrines of Greek and Roman philosophers; but Grotius, Pufendorf, and the semi-clerical holders of the university chairs kept up the Catholic tradition, in so far as they appealed to revelation and the law of nature as confirming each other, though some put more emphasis on the latter than on the former.

Adam Smith broke with the clerical tradition, and, treating of things in themselves, founded the new science of political economy. Here were true laws of nature which it was thought impiety to break; the violation of which brought disaster and ruin to states. So strongly was the view at one time held that these were laws in some jural sense that

it was proposed at a later date to settle trade disputes by setting up arbiters and courts to administer these laws. But now a reaction has set in. It is seen that the science is a pure abstraction, that the so-called laws are merely mathematical formulæ, which rational beings should use, and, if they can, in some cases defeat by calling into operation other laws of nature, economic or other. It is not a science to be put to practical uses, apart from ethics or religion, or some other criterion of its results.

So with Person. Cicero founds law on the nature of man; Hutcheson, Reid and later moral philosophers raise questions of psychology, and now we may find psychologists, who trace back the origin of right to feeling. Few branches of study have in modern times attracted more attention than physiological psychology. It is particularly applied to criminology, penology and the administration of the law in marriage, divorce, and personal relations generally.

And once more we may see in the reform of legal procedure and codification, and in the attempt by the modern English school to found a separate formal science of jurisprudence the third branch of the Roman division—Actions. But such an abstract science is useless to the practical lawyer and misleading to the scientist unless its results can be reconciled with those of economics, psychology and ethics.

Alongside these sciences we have the new science of sociology which attempts to deal with humanity in organised groups of growing complexity. History is an attempt to teach experience by narrating facts, sometimes also by pointing out the moral to be drawn; it may mean anything from statistics and chronological narration to metaphysics and theology. All these sciences are attempts to systematise our knowledge of men and things, but the interpretations take their colour from religion and other extraneous sources. And even if our knowledge were absolutely accurate we cannot fall back on nature or the nature of man, for, as Montesquieu showed, the natures of men and of nations are

infinitely diverse, and will justify the most contradictory rights, duties and laws. Reason is a will-o'-the-wisp for as we have seen reason is often unreasonable.

Two tendencies characterise modern British legislation. First, the search for facts to form a basis. This is carried out through commissions and debates in Parliament and the Press. Then much legislation is left to departments in Orders of Council, to local authorities in bye-laws, and to private individuals in contract. They know the facts, and can regulate their own rights. Secondly, we note the spread of catch cries, ideas which seize men's minds and appeal to their imaginations like a religion—freedom of religion, freedom of trade, rights of suffrage, temperance, social purity, mercantile honesty, patriotism, culture, education, efficiency. Mr. Beattie Crozier (*Hist. of Intellectual Development*, iii. 25) says that—

> "Civilisation advances by means of a series of great abstract ideals or ideal abstractions, blazoned on high in front and on either side of its advancing course, to lead it on ; and by their zigzag and opposing pulls helping to keep it steady on its even course between them. These ideals are . . . *means* only or instruments, and the illusion . . . is that men have in every age mistaken them for *ends*. In the earlier ages of the world, this was not only natural, but it was right and necessary in order to lend force and efficiency to action ; and even to-day it is almost inevitable."

This seems hardly fair to the practical statesman, dealing with the hard facts of everyday life, who must act often on imperfect evidence of the facts and without very clear knowledge of the more remote ends to which society is moving. It is easy for the philosopher, who is not responsible for practical results, to take Mr. Crozier's test of universality. Is such a test possible to mortal man ? The statesman does well by making his own ideal universal, as the Christian makes his church Catholic. The bricklayer, who laid every brick as if it were the copestone of the universe, would make a magnificent wall. By all means let him use the test to criticise other people's ideals with deadly effect. To apply it

to his own would inevitably paralyse all action. The answer to Mr. Crozier is that after all the statesman in modern times, if not in all ages, is only a common sense man in a particular position.

The preliminary inquiry into facts by means of committees and commissions of different kinds is very characteristic of British legislative methods. Sometimes the inquiring body is official, sometimes parliamentary, sometimes judicial, sometimes expert, or it may be a combination of some of these. Witnesses may be examined as in a judicial process. Judgment may be given by a committee with appeal to Parliament. They may try to discover the truth of a fact—*e.g.*, the flash-point of mineral oil; the efficacy of vaccination; or they may try to make new inventions—*e.g.*, gunpowder which shall be safe and smokeless; bullets at once humane and effective; remedies for the plague or cholera. The problem may be moral, as with the Contagious Diseases Acts, the Licensing Laws, money-lending and usury; or economic, as in the last example, depression of trade, bimetallism, Indian currency.[1] In short our Governments are accused of legislative cowardice, through their tendency to inquire, and ascertain all the facts before venturing on an opinion.[2] If men knew—that is, really knew—all the facts there would be no room for party differences; the modern politician's occupation would be gone.

We have now carried this tendency into international relations by means of arbitration. If personal or national feeling, opinion, greed, jealousy, or honour is involved, arbitration is impossible, and war may become inevitable. Defeat may either be regarded as a stubborn physical fact, which cannot be ignored, or it may be treated with pious resignation as the arbitrament of the God of battles. If the

[1] See Blue-book, memoranda chiefly relating to the classification and incidence of imperial and local taxes, 1899 [c. 9528], where a paper of questions was issued by the Commission, and answered by a number of professors and others in writing.

[2] See speech by Mr. A. J. Balfour in House of Commons, *Times*, 2nd April 1903.

question can be treated as one of pure fact, then arbitration is a common sense remedy. The difficulty is to find an impartial tribunal—that is, one which will eliminate all national or extraneous feeling. The machinery of courts, written pleadings, and oral hearings make the judge's work easier, for the facts may be too clear to admit of argument. In other cases a material compromise may be fair. If the national interest can be expressed in money or territory, then arbitration and compromise are possible and natural, and recommend themselves to the conscience of the ordinary right-thinking man.

The idea of "utility" is a favourite subject of attack with some philosophers, as religion is with others. It is, of course, easy to show that "utility" is no more a guide than "reason," "natural law," or "religion," for it also demands another standard. But when the common sense man ceases to be utilitarian he ceases to be rational. The word was common in the Roman law and was associated with equity. The *actio utilis* was an equitable remedy to supply the deficiency of strict law. *Utilitas* is used by Ulpian for equity (*cf.* Gaius, iii. 109, 160). Brissonius devotes nearly three folio pages to the exposition of these words. It still survives in the *quadriennium utile*—the period allowed to minors by Scots law to reduce injurious transactions entered into during minority. We have seen it in the phrase *dominium utile* (p. 50, *supra*)—and in the public interest, referred to by Paul, which allowed privileges *propter aliquam utilitatem* (pp. 103, 107, *supra*). Isidore of Seville gave us as one of his tests of good laws that they should be framed not "privato commodo, sed pro communi *utilitate* civium" (p. 356, *supra*).

Cicero (*De Rep.* i. 25) defines the State as "populus . . . cœtus multitudinis juris consensu et *utilitatis* communione sociatus." This evidently suggested the definition of Grotius (*De J. B. et P.* i. 1, 14, 1)—"Est autem civitas cœtus perfectus liberorum hominum juris fruendi et communis *utilitatis* causa sociatus," although in a previous passage

(Proleg. 16) he dissented from the statement of Horace (*Sat.* i. 3, 98)—

"Ipsa utilitas justi prope mater et æqui"—

and maintained that natural law is reinforced by utility (*sed naturali juri utilitas accedit*), and that utility is merely the occasion of civil laws.

We have seen Hobbes and Blackstone frankly appealing to utility—*salus populi*—or to the happiness of the people as an end (pp. 396, 425, *supra*). To these we may add a sentence of Rousseau, speaking of monarchy—

"Tout marche au même but, il est vrai ; mais ce but n'est point celui de la félicité publique, et la force même de l'administration tourne sans cesse au préjudice de l'État."—(*Contr. Soc.* iii. 6.)

"Quelle est la fin de l'association politique ? C'est la conservation et la prospérité de ses membres. Et quel est le signe le plus sûr qu'ils se conservent et prospèrent ? C'est leur nombre et leur population."—(*Ib.* iii. 9.)

Here then is a test fitted for the meanest intellect that knows one number to be greater than another. "Calculateurs, c'est maintenant votre affaire: comptez, mesurez, comparez." Of course he means *ceteris paribus*, and with a great many other limitations, for it is a poor ideal of the world to make it like a Stilton cheese, filled to its utmost capacity with contented mites (*cf.* J. F. Stephen, *Liberty, Equality, Fraternity*, 2nd ed. p. 194). But even this ideal is reached by the absurd assumption that the mites do not fight among themselves. At a certain stage they must turn cannibal or cease to exist.

Utility, like Kant's Categorical Imperative, is an empty formula, till it is filled with a content from experience. Utility changes its meaning with the end you have in view. If life is desirable, none disputes that utility is a safe guide for what is immediately necessary to preserve the merely animal life. If you have higher aims, what achieves these aims is useful for that purpose. But to determine our duties to the inhabitants of this globe a thousand years hence,

utility is merely a word. We can hardly look forward a century, for we do not know what a day may bring forth. There is no difficulty in reconciling actual utilitarianism in practice with the religious spirit. It is done in Islam. And even Christian divines, like Dr. Paley, are brutally utilitarian. They sometimes speak of morality and religion as the machinery for escaping from eternal perdition.

The relation of utility (expediency) and reasonableness assumed in Greek thought almost a proverbial form. Thucydides puts the statement in the mouth of one speaker that nothing is absurd (unreasonable) which is expedient (*οὐδὲν ἄλογον ὅ τι ξυμφέρον*), though he restricts it to the case of kings and states (*Hist.* vi. 85). The expedient and the just are associated in another passage (v. 105-107).[1]

The following sentences from Hooker's *Ecclesiastical Polity* show that there is with him a real connection between reason and utility:—

"All things that are, have some operation, not violent or casual. Neither doth anything ever begin to exercise the same, without some fore-conceived end for which it worketh. And the end which it worketh for is not obtained unless the work be also fit to obtain it by. For unto every end every operation will not serve. That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure of working, the same we term a law. So that no certain end could ever be attained unless the actions whereby it is attained were regular—that is to say, made suitable, fit, and correspondent unto their end by some canon, rule, or law. Which thing doth first take place in the works even of God himself" (Keble's ed. i. p. 200).

"God worketh nothing without cause. All those things which are done by Him have some end for which they are done, and the end for which they are done is a reason of His will to do them."—(*Ib.* 202.)

"If, therefore, it be demanded, why God, having power and ability infinite, the effects notwithstanding of that power are all so limited as we see they are; the reason hereof is the end which he hath proposed, and the law whereby his wisdom hath stinted the effects of his power in such sort that it doth not work infinitely, but correspondently unto that end for which it worketh, even 'all things *χρηστῶς* (*Sap.* viii. 1; xi. 20), in most decent and comely sort,' all things in measure, number, and weight.'"—(P. 202.)[2]

[1] As to the meaning of *τὸ συμφέρον*, see Grant's *Aristotle*, ii. 11.

[2] *Cf.* the translation of the word *χρηστῶς*, quoted from the *Book of*

"Law rational, therefore, which men commonly use to call the law of nature, meaning thereby the law which human nature knoweth itself in reason universally bound unto, which also for that cause may be termed most fitly the law of reason; this law, I say, comprehendeth all those things, which men by the light of their natural understanding evidently know, or at leastwise may know, to be beseeming or unbeseeming, virtuous or vicious, good or evil, for them to do."—(P. 233.)

"All men desire to lead in this world a happy life. That life is led most happily wherein all virtue is exercised without impediment or let." . . . "True it is that the kingdom of God must be the first thing in our purposes and desires. But inasmuch as righteous life presupposeth life; inasmuch as to live virtuously it is impossible except we live; therefore the first impediment, which naturally we endeavour to remove, is penury and want of things without which we cannot live. Unto life many implements are necessary; moe, if we seek (as all men naturally do) such a life as hath in it joy, comfort, delight, and pleasure."—(P. 240; *cf.* p. 225.)

"If here it be demanded how it cometh to pass that . . . there should be found even in good laws so great variety as there is, we must note the reason hereof to be the sundry particular ends whereunto the different disposition of that subject or matter for which laws are provided, causeth them to have especial respect in making laws."—(Pp. 246-247.)

"As for laws which are *merely* human, the matter of them is anything which reason doth but probably teach to be fit and convenient."—(P. 249.)

We may note that reason is regarded here generally as the end rather than the origin of laws. The distinction is like the Aristotelian one of final and efficient causes. Hooker would have no difficulty in frankly admitting utility as the principle which makes merely human laws, as it makes

Wisdom, in the Latin Vulgate, and the revised English translation of the Apocrypha. The word χρηστός (useful) is used in the sense of "moral," and occurs in Aristotle's *Poetics*. Like the Latin *homo frugi*, a man who was χρηστός was the very reverse of a "good-for-nothing fellow." (Reiskius, *Indices Græcitatis*, ii. 856; Butcher, *Aristotle's Theory of Poetry and Fine Art*, p. 304.) He was a man who filled his position in society and the State to good purpose. As to the modern idea of "utility," see Grant, *Aristotle*, i. 377, and *cf. Ethics*, V. i. 13, where the *purposes* of law are set forth (οἱ δὲ νόμοι ἀγορεύουσι περὶ ἁπάντων στοιχαζόμενοι ἢ τοῦ κοινῇ συμφέροντος πᾶσιν, κ.τ.λ.) to cause men to do acts which tend to produce or to preserve happiness for the body politic either as a whole or to any of its constituents.

We may also apply to jurisprudence as an art Aristotle's theory of design—"the better"—"the form" (εἶδος) towards which law tends—"the result which nature strives to attain, but rarely or never can attain."—(*Cf.* Butcher, *op. cit.*, pp. 140, 185, and pp. 2 and 315, *supra*). See also as to the doctrine of τέλος the end in itself, Grant, *op. cit.* i. 220, 420, 466; ii. 7, 36.

ploughs and agricultural implements. But he goes further by identifying the Divine reason with eternal purposes of God, so that if we assume that God is perfectly good and all-wise, we may assume that what we know or think to be his laws are good, though we do not know the reason or purpose of them. Probably Hooker would deal with the Divine laws as with merely human ones, which did not contradict the law of Nature, of Reason, or of God—defer to them because they are enacted. The order of society is a good end in itself. —(*Works*, i. 166, 273, 284, 399, &c.)[1]

SECT. XIII.—CONFLICTS OF IDEALS.

The universe may be regarded from one point of view as a system of conflicting forces. All the relations of men involve conflict, and when men become conscious of these relations the result is a conflict of interests. They call their interests rights, that is to say they expressly or impliedly ask society to approve of the enforcement of their claims, or to give active assistance in such enforcement, whereupon society interferes to settle or prevent these collisions by means of laws. The systems of law set up by different societies come into collision, and these collisions are in turn dealt with by wider general laws—jurisprudence (in the French sense), international law, and general theories of justice. But law is not merely the resultant of the collision of material interests; there is no jural parallelogram of forces. There is a something involved in the facts of a case, yet not in them—a something added by the person who attempts to judge. We have seen that the person of the judge involves in point of fact a new physical element, because he has new interests, social and individual. It is this something which we have dealt with as justice, equity, morality, and religion, and lastly, as an ideal element. These ideals of men are different, and come into conflict. How can we solve these new differ-

[1] Beattie Crozier's *History of Intellectual Development*, iii. 34, &c.; Morley on *Compromise*.

ences? We have already seen how men belong to different worlds in which the ideals necessarily differ. Indeed the same man for different purposes may live in different worlds, and it is often hard to keep them from coalescing. Some men pray when they should be doing business, while others swindle and cheat their deities even in worship.

In some aspects men's ideals are ridiculously high. Hobbes was right when he said that in a state of nature every man had a *right* to all things. The "all" that was, was, however, not very much. But with the progress of civilisation, peace becomes assured, and material interests become indefinitely multiplied. How many thousands of private soldiers have dreamt of becoming Napoleons! How many poor clerics of being Archbishops or Popes! How many law-clerks of being Lord Chancellors! How many ragged little boys of being millionaires! In so far as their dreams demanded actual realisation they were absurd, but they perhaps spurred their ambition to do something, and in the end most of them found happiness in a humble sphere, and thanked God that their dreams were never realised. But these ideals are inconsistent with similar ideals of others. Every man cannot attain the highest position in the world of material things. And such ideals only become moral when they inspire the possessor of them to act so that he may deserve them, and to find a satisfactory realisation in a spiritual or intellectual form.

And this is no less true of the ideals of obligation and duty. The youths whom we have just figured were prepared to accomplish any task, were eager to undertake any burden. The ordinary man asks work as a favour—a benefit to be conferred on him. The shirking of work and the lazy life of the Irish peasant, or of the old-fashioned university don, are exceptional cases—the product of civilisation which has provided for their material comfort on the standard to which they have grown accustomed. An office without any duties to speak of is a modern conception. Even the idle savage is

a product of civilisation, because he is no longer allowed to enjoy the strenuous life of the warrior and hunter—his own ideals. The ordinary man finds a certain amount of work a pleasure and a privilege.

Although we speak of such personal ambitions as ideals, they are not truly so. They are, as a general rule, material rewards demanded without consideration of the burden of duty undertaken, or the impossibility for the claimants of its performance. Nor is it astonishing that they all fail of realisation. If we consider how few men among the millions who inhabit this world are required as leaders, if we deduct the years of youth and age when men cannot work, and the hours of their lives necessarily devoted to eating and sleeping and recreation, we feel as if we could count the number of effective hours of work and thought of all the leading men in the world. These men are the brain of the body politic. If the brain is small it may only maintain animal existence; but the larger it is and the more highly organised, the higher will be the character of the whole body.

We may here notice the ideals which Professor Lorimer (*Inst. of Law*, 2nd ed. pp. 237, 353, and 523) regards as the objects of law, for they illustrate the impossibility of setting up one aim as the end of human life. Shortly, he holds that *order* is the proximate object of positive law; *liberty* the object of natural law; and *human perfection* the object of ethics. The sources of these ideals are obvious. The last is Greek, the second is derived from Continental sources and writers of the school of Locke, the first is sound British conservative utilitarianism. One end being final and supreme, it must control the others. Can anarchy not be permitted in one state or for a season in order to give an object lesson to the world and educate men towards perfection? May not men be deprived of liberty for a season in order that they may appreciate freedom? And if it is answered that eternal anarchy and perpetual slavery of the whole universe is meant, we reply that such statements mean

nothing. The terms "absolute order" and "absolute liberty" may be predicated of chaos. "Order" as an ideal must mean such order as does not destroy liberty, and positively promotes human ends. The historical struggles for liberty are by individual nations and individual men, and against individual oppressors, or for particular material interests. "Liberty" means such liberty as is consistent with order, and also promotes human ends. Again, perfection is unattainable unless men or at least man is eternal. "Perfection" can only be taken with the qualification "in so far as man's environment will permit" (p. 404, *supra*). Can a being, within whom the spirit contends against the flesh, and the flesh against the spirit, ever reach perfection?—(Taylor, *Problem of Conduct*, p. 241, &c).

But it is not necessary that you should have a theory of the universe to justify your taking your dinner. All life is made up of such isolated acts, and so it is possible for the vast majority of men to do without remote ideals. But the ideal assumes a new importance when the possessor tries to impose it on his fellow-men. If they accept it and follow him, all is so far well. If they refuse to follow, if they resist, who shall judge? If the ideas of liberty, temperance, virtue, knowledge are originally negative, they soon become positive forces. The individual possessing these is not in general content with his possession, but strives to communicate them to his fellow-men, or to use them to their disadvantage. But as a general rule the clashing of material interests solves the problem automatically. By change of circumstances one or both of the disputants may come to regard their interests differently, or the subject of dispute may entirely change its character.

On the other hand, it is often remarked how low are men's ideals. The savage has no time for such day-dreams as we have referred to above; his heaven is "eating and drinking." But even the modern statesman must often be satisfied with little; civilisation may mean only the absence

of serious crime; education may mean the power to read a penny dreadful and laboriously sign one's name. If you are starving and naked, your ideal will be a comfortable meal and warm clothes. Now the great bulk of mankind are labourers in some capacity, and from this category we must not exclude many of the capitalists, and the foremen who superintend them; their ideals are in general very gross and very low. In former ages they would have been savages, slaves, or serfs—in many cases, merely things like beasts, the property of a master or ruler. Modern Christian civilisation has made them persons with rights, and it is the protection and enforcement of these rights—person and property—which are dealt with by law.

For the lowest members of the State, if we can so call them, for they are really outside of society, we have the criminal law—the lowest ideal of what is absolutely necessary to keep society together.

The municipal laws of person, property, and contract and mercantile law, deal with members of an orderly society, and enable them to avoid collisions. They enable men to live peacefully, though they may be Protestant or Catholic, heretic or infidel, Conservative or Socialist, scientist, painter, poet, or philistine, trader or sportsman. There is a certain *minimum* of intercourse possible, and for this the municipal law provides. It may decide questions of property held in trust, and leave it to the religious, artistic, or scientific bodies to work out their special purpose in their own way, and by their own particular private laws.

But *ubi societas ibi jus.* We have already seen that wherever there are external material prestations by one man to another, there exists law or its analogue. But this principle is of much wider application. In the worlds of religion, morals, art, science, there are persons who claim deference from others, who feel it to be a wrong if their opinions are not implicitly accepted. There are others who from temperament or circumstances are ready to obey—to accept religious

formulas and moral precepts; or to admire statues, pictures, poems, or symphonies, if they imagine that it is the proper thing to do. Then there is the superior person, prophet, priest, philosopher, or critic, who either assumes the part of a judge or ruler over his fellows or is tacitly elected. He, too, claims this jurisdiction or sovereignty as a right, but if he is not voluntarily chosen they may resent his interference and reject his proffered advice. If the idealist identifies his interest with his opinions, and can persuade a sufficient number of people to assist him, the ideas of this single individual may become the interests of a society, and may be imposed by force on a minority. Here we see the intolerance of such idealists, and that the danger to the peace of society is greater in proportion as the ideals are remote from those which ordinarily prevail. *Festina lente* is often seen to be the highest wisdom. If men are rational beings the truth must ultimately prevail, provided the force used for its propagation appeals mainly to the reason. Mere brute force and persecution often set up material interests adverse to the truth—*i.e.*, what the legislator or persecutor considers to be the truth. Even advertising, which is a form of physical force, must be judicious.

The worlds to which men belong and their ideals do not necessarily interfere with each other if they are actually separated in space or time, or if they are studiously kept apart. But this may not be possible at all stages of history. For example when men insisted on external conformity in religious observances on which the safety and well-being of the state depended, the result was religious persecution. In our own day persons whose tastes differ in art may dispute till they commit a breach of the peace. Eminent scientists may quarrel personally, and abandon each other's society over some theory of the universe. Freedom of religion, freedom of speech, and freedom of thought may be claimed as rights or may even be conceded to be such by society when the claimants confine their actions strictly

to themselves, but when these go further and claim the aggressive right of propagating their views, they constitute an attack on the corresponding rights of others. Others need not come to listen to the propagandist whom they regard as a nuisance, and if they do they are barred from complaint. But those who complain of intolerance are often themselves the first offenders.

Men have therefore discovered that, as all must walk and move on the solid ground of the habitable globe, there is a corresponding sphere of rights which will enable them to do so without excessive collision and friction. This we have just seen is the municipal law—as a system of rights. It differs locally like language, but in any case men can always fall back on the language of nature—gestures and signs; and on the law of nature—attack, defence, or forbearance and sympathy. What men, therefore, call law in the jural sense is not an isolated phenomenon. It appears wherever living self-conscious individuals come into contact. Where we must draw the line between our human laws, as enforced by courts or enacted by legislatures, and the analogous laws which decide questions of opinion in theology, science, or art, when these are referred to a third party or to a tribunal composed of experts, is a question which must be reserved for discussion elsewhere.[1] All these are true interests of men, but they are not the interests that concern the policeman-view of the law. The police will remove a German band, not because you object to Beethoven's music, but because you object to their "making a noise." Again and again in the history of the world men have degraded the spiritual to the level of the material interest. Men have—

> fought "like mad or drunk
> For Dame Religion as for punk."

Politicians in certain ranks often assault each other. Toleration—religious and other—is one solution of the difficulty of

[1] No reference is here made to the ethical side of art or science. See Taylor's *Problem of Conduct*, p. 194.

conflicting ideals. It is the plan adopted by common sense men; by gentlemen in polite society if they wish to retain friendships; by the executive in Ireland when they prohibit certain political meetings, in order to prevent breaches of the peace, while in other respects the utmost licence of speech may be permitted. It is a fact that intolerance in private life and in the State often defeats itself. The border line at which toleration ceases to be a right and intolerance becomes a duty must be discovered by a wise following of experience.

Some complain of the intolerance of the modern philanthropist, as if he would insist on everybody selling all that he had and giving it to the poor. The ordinary Poor Law, with rates equally spread over the community, so as to give a *minimum* of support to the failures of society, seems a convenient mode of organising corporate charity. In the projectors of the system it was true charity, but when their scheme was carried it became hard law. But some schemes defeat themselves, as when proprietors of houses deemed insanitary sometimes prefer to pull them down, so that the law deprives some of the very poorest members of society of all shelter whatever. Then come schemes of socialism for housing the poor, providing amusement, &c. But all these schemes depend ultimately on the physical facts of the density of population, and the idea of personality that is to be sustained. In a petty tribe, with unlimited land to wander over, and powerful enough to keep out undesirable strangers, communism is possible. There is a point—say, if there were eighty millions of people in England—where private property might become impossible. If a population is struggling with famine and plague, the ideal is to live merely, and socialism or communism may be the necessary means to keep the society in existence. The bonds of society may be unloosed and many may flee from the city or state.[1] The existence of poor-houses, hospitals, and

[1] *Cf.* the economic effects of the black death in England (Green, *Short History*, chap. v. sect. iv.); and see the statutes of Edward III. *Cf.* also Stephen, *Liberty, Equality, and Fraternity*, p. 193.

charities of all descriptions are a result of luxury and superfluous wealth. In a savage state all are what we consider poor, and the modern civilised poor would either never exist at all or would die out from want of the lowest necessaries of life.

But charitable institutions are an undoubted evil, in so far as they undermine the independence of the poorer classes. The aims of philanthropists are therefore economic as well as moral. They are economic in so far as they aim at a more uniform division of wealth, and moral in so far as they aim at a higher standard of comfort, thrift in the use of wealth, and independence of charity. Without moral improvement the economic might only aggravate the evils complained of. For example, if higher wages are spent only in drink, higher wages are a loss and not a gain to the workers.[1] Even old age pensions must be in point of fact and must be regarded by the recipient as mere deferred payment of wages, if the manly spirit of the community is to be preserved. Otherwise the working classes must sink to the level of the mobs of ancient Rome, who looked to the State for food and amusement, the whole aim of their existence. For these purposes it may be necessary to forbid the immigration of undesirable criminal or diseased aliens, for no statesman is called on to legislate for the whole universe, and no state can be expected to court destruction by sacrificing its own citizens to make room for inferior races or the refuse of foreign nations. By such legislation the ideal of humanity is not necessarily restricted, because a state may afford assistance to strangers in other ways than by offering then a miserable asylum.—(Reeves, *State Experiments*, ii. 328.)

There may also be a conflict of ideals as to legal forms. These necessarily arise when a legal profession is instituted.[2]

[1] Report of the Prison Commissioners for Scotland for 1901 [Cd. 1060], p. 7. Same for 1902 [Cd. 1540], p. 6.

[2] This conflict between form and matter is not confined to law and religion. It is seen in the rise of professionalism in modern athletics, where a few play the games, and the multitude, whose health depends on outdoor exercises, merely look on and bet on the result. These persons are

The interests of the profession clash with the interests of the persons whose rights call for vindication. The common man calls for extreme rapidity and certainty of decision. The scrupulous lawyer, who knows the difficulty of doing justice, may elaborate forms and delay just to make sure that he is right. The Chinese allow appeals and re-hearings until the cost of the lawsuit outweighs the value of the matter at stake. There must be a mean somewhere. In the Scottish Small Debt Acts we have provided a form of action which is rapid, cheap, and generally satisfactory. The new Mercantile Court in London is another attempt to meet the particular demands of commerce. But in the ordinary legal procedure in Scotland, and in conveyancing both in England and Scotland, there is much room for reform. These reforms are neglected because the class they affect is a small one, and the reforms demand professional knowledge. Such reforms will only be proposed and carried by some lawyer who is willing to be the mouthpiece of the public, and perhaps incur the resentment of his professional brethren for a time. Such has been the history of reform from the days of Solon to those of Cneius Flavius, and even in our own day with the introduction of the Torrens system of conveyancing in South Australia.—(Harcus, *South Australia*, 75; Rusden, *Hist. of Australia*, 2nd ed. iii. 422; Reeves, *State Experiments*, i. 211, 331.)

To discuss the distinction of form and matter[1] would carry us into the region of metaphysic. The distinction is familiar to the common sense man and subserves useful purposes; but, as we have observed already, forms are not the ultimate ideal of jurisprudence. Primitive forms are instinctive, rude, and even unjust. The first justice, as we have seen, is an affirmation of the need of forms. But the subject of law is unintelligible unless it has a content of human

formal athletes. Betting gives the gambler a *formal* interest in sport, though he may consider it *material*.

[1] See Sir Courtney Ilbert's *Legislative Methods and Forms*.

interests. Plato, Aristotle, Isidore, St. Thomas Aquinas, Hobbes, all discussed matter as well as form of law. Hobbes' antipathy to lawyers was about as strong as his dislike of priests for their formalism.[1] It is said that Austin made a mistake in placing utilitarianism in the forefront of his system of analysis of forms. It was in reality a survival of the mode of treatment followed by his predecessors. In early treatises on International Law, substantive rights were prominently discussed under the head of *casus belli*—causes of war; modern treatises are almost entirely formal, but the material aspect survives in chapters on recognition and intervention. The impossibility of separating form and matter, however hard you may try, is practically demonstrated by Professor Holland in his *Jurisprudence.* He discusses marriage (p. 165), and actually classifies corporations "according as they subserve [certain purposes],"—(p. 323).[2] We have heard of a Lord Chancellor who knew a little of everything except law; but one who knew legal forms and nothing else would be a very useless personage indeed. You cannot write a tragedy merely by learning spelling, grammar, and prosody. Mere logic will not make a scientist or a statesman; for, as one of the most eminent living logicians has declared, the chief purpose of the old formal logic of the schools is to frame puzzles for students in University examinations. As Professor Bosanquet says (*Essentials of Logic*, p. 44), "In [one] sense logic is emphatically 'formal,' though not nearly so formal as it is often supposed to be." The legal philosopher must therefore be warned to remember—*μηδὲν ἄγαν*—*summum jus summa injuria.* Pure formal jurisprudence may be an interesting study to the metaphysician, but

[1] See his remarks on "Precedent," —*Works*, iii. 91, 266; and iv. 228.

[2] Professor Holland (*Jur.* pp. 7-8) may urge that his use of the term "form" has the authority of Aristotle (*cf.* Zeller, *Aristotle, &c.* ii. 2), but Aristotle would have regarded Justice, Equity, &c. as the *form* of law. Mill's remark on Hamilton's use of the term applies to Professor Holland's, that it "affords an additional specimen of the incurable confusion in which the processes of thought are involved by the unhappy misapplication to them of the metaphorical word 'form'" (Mill on *Hamilton*, 2nd ed. 453; *cf.* Ahrens, *Droit Nat.* 7th ed. i. 152 *et seq.*)

it is a matter of little concern to the common sense man demanding his rights or inquiring as to his obligations, or to the practical lawyer advising him or deciding as to the validity of such rights and obligations. This is another form of collision of ideals, but this is between those of the meta-physical jurist and those of the practical lawyer.

Law has thus from the point of view of the common sense man come back to the point from which it started. His first laws were truly natural laws, plain, obvious, just inferences from the facts of nature, so plain, obvious and just that they seemed part of nature itself. They were like the pieces of ore or pure metal which were found lying on the ground, and were used by the primitive man. For the richer deposits deep scientific mining may be required, and the reward is so much greater. Primitive forms of procedure were informal and chaotic. So the laws of the modern State are as truly founded on the facts of nature, but as society has become complex, and our knowledge has extended its ramifications far beyond the powers of individual men, so our laws present a continuous course of evolution, whereby they are accommodated to the growing complexity of society, and reconciled with the ever-growing mass of human knowledge. How this is to be accomplished the common man does not know, but he calls in the aid of professional politicians of all classes, experts, economists, and philosophers, recognised and orthodox, as well as quacks.

And corresponding to the three ideas of right, duty, and law we now find that our ultimate working statutes are not what the ruler holds to be absolutely ideal, or what the subject regards on the one hand as completely satisfying his natural claims, or on the other hand as perfectly free of burden, or what the outside prophet, idealist, or critic pronounces perfect; but they are what the ruler can enforce, what the subject can secure or submit to, and what the fair-minded critic charitably forgives in respect of human ignorance and imperfection. If we may trust Plutarch (*Solon*, 15),

this fact had been discovered by Solon six centuries before the Christian era. It was discovered by the first philanthropist who tried to suppress lynch law. All working laws and rights are the resultant of many forces; they are a compromise between the ideals, the passions, and the material interests of the rulers, the subjects and the greater public, who may be included under the description of critics, guided or misguided by political philosophers.

When men regard their institutions or their laws as perfect it is more probable that their ideals have changed than that the world has improved. Long habit has made them grow accustomed to their imperfections, or they have grown weary of the struggle for improvement. Young men see visions; the old are naturally conservative. When the millennium comes the world will be in its old age.

While the common man is not particularly concerned with the means by which his laws are made, he is much interested in the result. In other words, he draws no distinction between politics and jurisprudence, as he draws no distinction between story-telling and literature. He cannot make a coat or a pair of boots, but he knows when they fit and when they are uncomfortable, and as for fashion he is content to be led by his friends, or even by his tailor or bootmaker. So with the results of legislation. He may insist on its coinciding with the revealed will of God, or with long-established prejudice and custom, or with what he thinks to be justice and morality, or with common sense—that is, the ideas or feelings of himself and his immediate neighbours. If the new laws do not seriously interfere with any of these vague ideas they will be accepted or tolerated; but if they do so interfere, the ideas may be again modified to accommodate themselves to the laws. Again, men may quietly ignore the laws and let them become a dead letter, and so our great legislative activity may result in nothing, like the great literary output which is practically and avowedly unread. For the ordinary moral,

just and law-abiding man the law may be ultimately summed up in the three rules—to live honourably, to hurt no man willingly, and give every man his due, or, in the old Levitical rule, more commonly known as the Christian precept, to love his neighbour as himself. But, however high his aspirations, these maxims to the ordinary man are not merely metaphysic, for he imagines that they mean something which he tries to realise in actual life, although his interpretation and practical application fall lamentably short in the opinion of the most favourable critic. Who is his neighbour? In practice it is generally one of a very limited circle indeed, and those outside, if not enemies, are fair objects of aggression and plunder. What is honesty? It is too often the merely abstaining from injuring one's neighbour, because the neighbour might give back more than he got. When he gives his neighbour what is his due, the amount is often measured by the giver's meanness. When he places himself in his neighbour's position he often regards himself as a paragon of virtue, which he himself is not in actual practice.

It may be admitted for our present purpose that the maxim "Thou shalt love thy neighbour as thyself" is an ideal absolutely impossible of attainment. No man can put himself in his neighbour's place unless he can become his neighbour and live all his life, with all his inherited qualities, and then he has lost the position of being another, for he has become the neighbour. It may also be admitted that if it were attempted to carry out the principle to its logical end, it would destroy society. If interpreted literally it would imply every man abandoning a task for which he had at least some qualifications, and devoting himself to another for which he had almost none.—(*Cf.* Beattie Crozier, *Intellectual Development*, iii. 28.) But at the same time it must be admitted that the maxim in some form or other is widespread,[1] and is the only practical rule of law or morals which some men possess. It is an example of generalisation or

[1] It was expressly taught by Confucius (Max Müller, *Last Essays*, ii. 270).

universalisation of an idea common to the unscientific man. It is an extreme revulsion from the hate or suspicion of his neighbour, which is attributed to savages and primitive peoples, which, indeed, is also a rule incapable of universal application, the two ideas being the extremes of the analytical spectrum, to which we have referred. Hatred of enemies will produce little practical inconvenience, if you hardly ever see a stranger. It is easy to love everybody when you know only a dozen to speak to, and others only to look at. The man of good intentions possessing only this rule will act like the countryman introduced to court life whose only idea of etiquette is to do as he sees others doing. He will make many blunders, but his neighbours, perhaps guided by the same rule, will charitably excuse them, or will thank him for the enjoyment they derive from his mistakes. So in legal matters, the man with the constant and perpetual will to give his rights to his neighbour will in a case of difficulty consult a friend, a professional lawyer, or even apply to the law courts for guidance. We are not here dealing with the criminal class but with men in society, who are willing and ready to give every man his due if they only know what that is. Such a man may live a long life without being able to formulate a single rule of law, just as he may carry on conversation without being able to parse a word or having ever heard of a rule of grammar. The Ten Commandments for such persons contain sufficient detail. They interpret and apply them for themselves, and as with what we have described as prophylactic law (p. 254), persons whose consciences are very sensitive will avoid the very appearance of evil, and carry their rule a great deal further in practice than a third person would be disposed to prescribe. We may compare these vague general rules to old statutes which briefly laid down a principle to be applied and developed by the courts. Many men are worse than their professed creeds, and as many are better. Circumstances—the physical environment—determine so much for men that the average conduct

may be very similar, while their abstract ideals are even contradictory. The theoretical creed may be seen only in occasional outbursts of fanaticism or in occasional acts.

The rule in question is more easily applied in questions of morals and etiquette, where the prestation demanded or expected is mere feeling or kind words. There are churls to whom it is an effort to be polite; polite society deals with these as criminals, by banishment or social ostracism; those who have the power may administer punishment appropriate and severe. The rule is a general rough guiding principle for society judges as well as individual actors, and is readily interpreted by experience and circumstances. It is a rule which enables men to overcome friction in society. But at a certain stage, where the friction becomes violent collision—cases of slander, assault, and serious fraud and cheating—the appeal is to the State law courts and a wider society. But the law applied by these courts—except, perhaps, when a jury is introduced—is more regular, more rigid, and embraces a wider extent of experience. The reference to a jury is thus not only an appeal to a looser equity, as in criminal trials in France, but an appeal to material experience and knowledge of the world, as in most civil jury trials in England. Legal form, strictly so-called, stops when the issue is remitted to the jury, and begins again when the court formally applies the verdict. The substance of the decision is the justice, equity, and experience of common sense men, guided by the special legal experience of the presiding judge.

The good citizen grows into the legal system, and to him it becomes as natural and as much part of himself as his mother tongue. Right, Duty and Law are merely analytical abstractions. Right appears when he wishes to assert and justify an act of aggression on his own part, or resist aggression on the part of others; Duty when he justifies and recognises a burden imposed on him; and Law when there is a conscious attempt at reconciliation of a conflict. In real life they are all present as a single living process, and the

abstractions make their appearance only when the process is disturbed.

The Roman maxims and the Levitical or Christian indicate the two points of view which we have already discussed—the physical and the ideal, the legal and the religious, the formal and the material; but they both arrive at the same result, because they are both rules for actual conduct in the same physical world, and they must be interpreted and applied in the light of experience. The two views, the Roman and the Christian, are supplementary; they are founded on human instincts, and so we may say that ordinary men and women guide their conduct by the law of nature—the law written on every heart, the law of which no man can plead ignorance.

Thus in the common sense man we have traced a development of the idea of right. It arose in the physical relations of men competing for possession of fields and material things; it expressed itself in vague forms of actions, claims, appeals—for rights, justice, liberties, immunities, powers, and was embodied in rulers, judges, justices, censors, —definition so indefinite that it was not definition. Whatever form the claim or the award may take—law, justice, equity, morality, religion, reasonableness, rationality, utility, it is in idea one—the public good. The idea is one and the same, because however human experience may vary, human nature is fundamentally the same in all climates and in all ages.[1]

The professional lawyer is therefore entitled to maintain that law implies and embodies all these ideas. He may regard himself, as Ulpian thought he should, as a priest of right, for his knowledge and experience, more wide and abstract than that of the common man, may appear to the latter as in a sense supernatural, but the danger to the legal profession, as to all priesthoods, is the tendency to exalt the form over the spirit, to become a slave of external

[1] Stephen, *Liberty, Equality, Fraternity*, p. 195.

ritualism—to imagine that institutions and conduct must be just because they are legal, or customary, or in accordance with actual facts.[1]

The apparently insoluble difficulty of reconciling our ideals with practice may be overcome in the actual lives of all right-minded and intelligent men, by at once keeping our feet firmly on the solid ground of fact and experience, and our eyes fixed on the pole-star of justice, to which men in all ages and in all quarters of the globe look for guidance.[2] But philosophers and historians tell us that notions of justice are perpetually shifting, just as astronomers tell us that what we ignorantly call the fixed stars are palpably moving to their more acute vision. If the navigator assumes that the stars are fixed he will not err; for his short voyage, for our short lives, for our short stages they are fixed. Besides, for still shorter coasting voyages, such as most men take, our ordinary experience and knowledge of headlands, tides, and currents suffice. So in society men have in general to deal only with a small circle of which they are the centre—their own family and immediate associates. To consider the affairs of the universe while more immediate concerns call for attention is to court certain disaster. Equality—*suum cuique*—love of one's neighbour as one's self, to respect the traditions of his ancestors, or the opinions of his fellows, are fair working rules for the ordinary common sense man. If he thinks his rule divine, or philosophical, or rational, it will have a stronger hold of his spirit. But the sphere within which his spirit can alter its environment is so small that human life can be regarded as subject to evolution and so can be treated scientifically, for it is subject to truly physical laws of nature which cannot be evaded.

And this applies to the judge and the legislator as well as to the litigant or the citizen in his private life. The judge

[1] *Cf.* Cicero, *De legibus*, i. 15, 42, with the views of Hobbes, pp. 357 and 400, *supra*.

[2] οὔθ' ἕσπερος οὔθ' ἑῷος οὕτω θαυμαστός.—Aristotle, *Ethics*, v. 1. 15.

swears on appointment that he will "do right." He may dream of ideal justice, but his daily routine of duty calls him to decide perhaps hundreds of cases involving trifling sums of money, and trifling squabbles and petty points of detail in procedure. If he has the constant and perpetual will to "do right," he will decide everything in accordance with legal tradition and the general moral aims of society. So the legislator, whatever his ideals, whatever the promises he makes before his election, soon finds that he is not legislating for the millennium, but groping painfully in a dim twilight of ignorance and prejudice; that he must be content with a supervision of public affairs from day to day, voting annual supplies, and passing enactments which at the best may be only a temporary alleviation of human troubles.

In our discussion of Right, Obligation and Law we found that it was possible to express each of these ideas in an infinite series (pp. 122, 199, 203, and 316, *supra*). We now find that the aims of men can be presented in the same form. The litigants immediately interested in the subject of a suit have a very narrow and present object in view. No doubt there are exceptions. But with all deference to Von Ihering,[1] most Englishmen would say that their countryman described by him, who spends money and time litigating about an overcharge in a hotel bill is a fool, and very far indeed from being a type. The heavens will not fall though he pays a few marks beyond the market rate for lodging and food. The Scotsman, at least, has a more excellent way; he would pay, and take the lesson; he would warn his friends, so that the hotel-keeper would lose more than he ever dreamed of gaining; and for the future he himself would make bargains beforehand with hotel-keepers, cab-drivers, and porters, and so save both his temper and his pocket.

But the judge in a litigation has other ends. He does justice to the individuals in accordance with his oath, but as

[1] *Kampf um's Recht*, 17th ed. p. 45; quoted with approval by Paulsen, *Ethik*, 5th ed. vol. ii. p. 143.

he is setting up a precedent, he tries to do justice to possible future litigants. If this is law, it is a *general* rule. This, as we have already seen, is what is meant by the qualification of generality added by Hobbes and his successors to their definition of law.—(Holland, *Jur.* 22.) And once more the legislator, who is, so to speak, deciding disputes *in vacuo*, necessarily makes his rules still more general. He has the interests of the whole body politic to consider. Then the philosopher takes a still wider view, and tries to embrace men of all time and men of all races in his ideal. And if we dare to speak of God as a legislator, He legislates for a universe of which we know almost nothing.

We have noticed the tendency of law to become prophylactic,—that is, to anticipate and prevent breaches of order at increasingly earlier stages. There is a corresponding tendency to make ideals more and more remote, to grasp at ultimate perfection; but of course if men's remote ideals are already transcendental, the exigencies of practical life compel them to adopt less remote concrete ideals. On the scientific side we may recognise these tendencies in Mr. Spencer's demand of a "rational utilitarianism" as opposed to the merely "empirical." The distinction is between proximate and remote, either in the past or the future.—(*Principles of Ethics*, i. 57.)

In all our discussion we have been dealing only, or at least mainly, with the ordinary common-sense man, and so a discussion of the exceptional man—prophet, reformer, genius—is beyond our present purpose. He also is a man and subject to the physical laws of nature. What can we say of his ideals, and whence they come? What can we say of conflicts of ideals such as those presently to be noticed, which have appeared in history and affected law and legislation? We can hear the sound thereof, but cannot tell whence they come and whither they go. But this we do know, whatever they are to the founders—divine, rational, just, equitable, natural, or any other name you can devise—they change

with their successors. The ideas become material interests—common everyday claims of right; kings, priests, jurists, soldiers, poets, artists, become members of trades or professions. They work for money, or merely to maintain the founder's tradition; the body may be left and the spirit gone. A great reformer may found a church or a university; piety or learning may be his ideal; a time comes when his successors are concerned merely with benefices, titles, salaries, and statistics; professors may try to get as much money as possible for as little work as possible, and some students may think of nothing but passing examinations and taking degrees. Here we have another law of nature, a fact of human history which demands examination. Everyday experience shows that it applies to every Act of Parliament. The very men who voted in the majority for it, set themselves to defy or defeat its provisions.

We have already compared the leaders of men to the brain of Society. We might compare them to the reed which sets an organ-pipe in vibration. If they are not tuned to the same note there is no result, but when they are in tune the great sympathetic tone of the pipe responds to the motion of the invisible reed. The inspired prophet who finds his teaching accepted has no doubt that the acclaiming voice of the people is the very voice of God. But when masses of men inspired by these ideas come into conflict we seem again to be face to face with the elementary forces of nature. Hobbes was wrong in imagining that war—the *bellum omnium contra omnes*—ceased by the institution of the State. It merely took another shape—modern competition in trade, conflict in matters of opinion, and in politics and religion. War, like thunder, storm, tempest, and earthquake, seems to be the natural mode of solving the problem presented. So we see a struggle for supremacy between Roman civilisation and Carthaginian—Aryan and Semitic; the Crusades—Christianity and Mohammedanism; the thirty years' war—Protestantism and Catho-

licism; the civil war in England and the Napoleonic wars—feudalism and democracy; the civil war in America—slavery and freedom—agriculture and manufactures; the labour wars of the last few years on the European Continent and in America—capital and labour. These are only a few types of events which show how helpless men are to rule themselves.[1] It is no answer to this to show that every single individual who drew a sword or fired a shot in these struggles had a motive peculiar to himself, one for glory, another for money, a third because he was compelled, a fourth for hate of some individual enemy. The war and the ideas which it represents are more than the sum of these motives, and different from them, just as we know that each particle of sand in an earthquake has its path determined by dynamical law, but the whole phenomenon cannot be measured and described, except vaguely and generally by science. All that men can do is to adapt themselves to the changes made, and try to avoid being individually overwhelmed by what they cannot control. It may indeed be fairly maintained that the ideals referred to are generally unknown to the actual combatants, but are abstractions made long afterwards by the spectator, historian or philosopher, in order to make the struggle and its issue intelligible to himself. So we have reached a stage of our discussion where we feel law ought to prevail and does prevail, but it is a law beyond human power to enact or enforce. To jurisprudence as to science all things are assumed to be possible. The ordinary achievements of science are impossible to one generation and miracles to the next. So in law and politics men try to hit the mark by overshooting it. A few years ago the Czar of all the Russias invited a congress to meet for the purpose of discussing disarmament and inaugurating an era of peace. The congress met and made a few laws—real jural laws—which should satisfy the most orthodox Austinian. They set up tribunals to deal with a few petty questions;

[1] Stephen, *Liberty, Equality, Fraternity*, pp. 179-183.

they made regulations for combatants, and provision for attending to the wounded, but they left the fundamental question of the possibility of perpetual peace where they found it—an unsolved mystery. But the State itself is a wonderful invention to which men have grown accustomed. If the individual man is rational, and endowed with a power which men call free will, why should not mobs be rational also? We have partially succeeded with the State, why should we despair of future progress in the same direction?

The fallacy of all such schemes lies in this, that because for some purposes we can abstract the State or humanity and treat it as a person, as a unity—a Leviathan—it is assumed that the State is a unity for all purposes.[1] The institution of royalty, where the King is the centre of inertia of the social system, has enabled men to grasp the unity of the State, and modern kings are a powerful factor in maintaining peace and order in the world. Modern wars are due chiefly to the ignorance of savage and semi-civilised communities, and to the passions of rashly thinking mobs. Can these be controlled? One way is by counter appeals to feeling; but this is not always successful. An appeal to brute force may, as with persecution, defeat itself or secure a barren victory. Nor are material ideals and mechanical compromises more successful. The utilitarian philosophy has been represented as an attempt to bring morals within the area of science (Stephen, *Liberty, Equality, Fraternity*, 2nd ed. p. 357), but the difficulty is to find a standard of measurement. Certainly happiness is inadequate. It may be suggested that the utilitarian school in England attempted to extend economic formulas to morals, with its parade of mathematical figures and notation; but even economics reaches "very few practical conclusions." — (Marshall,

[1] A curious difficulty in this respect has arisen in recent practice of municipal politics. It is found that the areas of burghs which were sufficient for ordinary legal administration are too small for tramway systems and the supply of electricity. So with parishes as educational areas.

Economics, 3rd ed. i. p. 748.) John Stuart Mill seems also to have blundered in extending the idea of right—as a purely legal conception—to spheres in which it had no meaning. It is impossible to treat the rights of states, or the rights of races of men, as if they were rights of single private individuals to their clothes, their weapons or tools. It is impossible to treat freedom in general, religion, thought, as if they were material things which can be seen and handled. But at the same time all these ideas are realised, and can be realised only in living individual men, in actual corporeal things, and definite individual acts. Law in the jural sense has its actual foundations deep in the physical nature of men and of things. Law and the idea of legal right are, however, only the foundation on which the superstructure of social relations must be built. Every law demands in its application notions of justice, equity, morals, religion, and practical experience of the world of men and things. The problem how to reconcile the physical and the spiritual sides of man's nature—rigidly formal law with the aspirations of justice and equity—is one of pure metaphysics, which nevertheless each man must solve for himself in some practical shape, under pain of death.

It will be maintained by some that such questions do not belong to jurisprudence. But this is not the view of the common sense man, or even of the practical lawyer, who is concerned with the living organism of society. Jurisprudence is not mere morphology. The morphological jurist is like a naturalist who throws away the oyster and studies the shell which was made by the oyster and has a meaning only for it. The pearl merchant and the legal tradesman are confined by the exigencies of trade to external forms, but they have no title to criticise the scientific standpoint, which regards even the shell as a living process. The phenomena of jurisprudence are continuous, as the history of politics, ethics, and economics shows. We cannot, for scientific purposes, draw an arbitrary line between law and these sciences

and confine the province of jurisprudence to legislation, as Austin virtually did, or to judicial decrees and precedents, as has been proposed more recently, or even to extrajudicial forms, as we have examined these in the foregoing discussion. Common sense rebels against the restriction of jurisprudence to the anatomy of the skeleton of law in forms, and strives continually to deal with the physiology of society. A living organism will profoundly modify the skeleton, even if it cannot make one entirely new. The ordinary man is interested in the life, the spirit, the soul of the law, and this fact has been emphasised by Montesquieu and Von Ihering in the titles given to their great works. It is this life which appears in the common sense and tact of the practising lawyer, the broad equity of the courts and the legislature, and which is assumed in the conduct of the individuals who are subject to the law, who claim rights and fulfil duties. The history of law is a perpetual struggle to give a concrete form to this living spirit. The legal pedant, no doubt, has his uses; but as with the grammarian, the common sense man, for whose benefit laws exist, soon grows impatient of his rigid absurdities when they defeat the very ends of justice itself. The parallel between the development of law and of language is in this respect very close. Both take their rise in the needs of ordinary men; both tend to become rigidly formal in the practice of specialists and experts; and both have been revolutionized, complicated, and simplified by the supervening usage of common men, as in modern English and the Romance languages, and in mercantile law, the law of wills, and other departments. But beneath verbal forms thought is persistent if not unchangeable, as beneath legal forms there is eternal law—justice. The scientist may distinguish thought and language, legal forms and justice, but the common man finds them one in experience, and strives to obliterate the distinction.

As the philosophical jurist passes in succession from the

crude hard facts of legal practice, as seen, for example, in courts-martial in time of war, through the series of criminal systems, municipal laws, and special codes, he finds always a residuum beyond, which appears to baffle his impotent analysis, as those scientists who in recent years have devoted their energies to liquefaction of gases always find a new gas, which appears to defy their powers. Nowhere has this idea been more finely expressed than in the lines of Browning, which have been already referred to, where he speaks of—

> "every intermediate kind of court
> That takes account of right or wrong in man,
> Each unit in the series that begins
> With God's throne, ends with the tribunal here.
> God breathes, not speaks, his verdicts, felt not heard,
> Passed on successively to each court I call
> Man's conscience, custom, manners, all that make
> More and more effort to promulgate, mark
> God's verdict in determinable words,
> Till last come human jurists—solidify
> Fluid result,—what's fixable lies forged,
> Statute,—the residue escapes in fume,
> Yet hangs aloft, a cloud, as palpable
> To the finer sense as word the legist welds."
>
> (*The Ring and the Book*, v. 1761-1784.)

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